(13)

No. 06-531

Title: Michael W. Sole, Secretary, Florida Department of Environmental Protection, et al., Petitioners

v.

T. A. Wyner, et al.

Docketed: October 19, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-14750)
Decision Date: April 25, 2006
Rehearing Denied: July 17, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 16 2006	Petition for a writ of certiorari filed. (Response due November 20, 2006)
Nov 16 2006	Brief of respondents T. A. Wyner and George Simon in opposition filed.
Nov 29 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 8 2007	DISTRIBUTED for Conference of January 12, 2007.
Jan 12 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Tuesday, April 17, 2007.
Feb 23 2007	Record received from U.S.C.A. for 11th Circuit. (U.S.D.C. for Southern District of Florida Record) (1 box containing transcripts)
Feb 23 2007	Record received from 11th Circuit for U.S.D.C. Southern District of Florida. (1 box)
Feb 26 2007	Brief amicus curiae of United States filed.
Feb 26 2007	Joint appendix filed.
Feb 26 2007	Brief of petitioners David B. Struhs, Secretary, Florida Department of Environmental Protection, et al. filed.
Feb 26 2007	Brief amici curiae of Commonwealth of Virginia, 23 Other States, and Puerto Rico filed.
Feb 26 2007	Brief amici curiae of National League of Cities, et al. filed.
Feb 27 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 8 2007	CIRCULATED.
Mar 13 2007	Record received from U.S.C.A. 11th Circut. (envelope - contains briefs)
Mar 28 2007	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. (Distributed).
Apr 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 2 2007	Brief of respondents T. A. Wyner and George Simon filed. (Distributed).
Apr 2 2007	Brief amici curiae of Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, et al. filed. (Distributed)
Apr 2 2007	Brief amicus curiae of Center for Individual Rights filed. (Distributed)
Apr 2 2007	Brief amicus curiae of Brennan Center for Justice filed. (Distributed)
Apr 9 2007	Reply of petitioners David B. Struhs, Secretary, Florida Department of Environmental Protection, et al. filed. (Distributed)
Apr 17 2007	Argued. For petitioners:; Virginia A. Seitz, Washington, D.C.; and Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United

States, as amicus curiae.) For respondents: Seth M. Galanter, Washington, D.C.

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park, PETITIONERS

v.

T. A. WYNER, GEORGE SIMON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents T.A. Wyner and George Simon filed a civil action against the manager of a Florida State Park and the head of the Florida Department of Environmental Protection challenging a regulation imposing minimum clothing requirements in Florida's State Parks, which prevented Respondents from performing annual plays and political performances in the nude at the park. On February 13, 2003, less than twenty four hours later, the district court held an emergency hearing, at which the district court entered a preliminary injunction prohibiting the Petitioners from arresting or interfering with Respondent's performance. Thereafter, after a hearing on the merits, Respondents lost their claim for a permanent injunction and other relief. The district court determined that Respondents were prevailing parties because of the preliminary injunction, and awarded Respondents attorney's fees and costs. Petitioners appealed the finding of prevailing party status and the award of attorney's fees. The Eleventh Circuit Court of Appeals affirmed in *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App. 1a)
The question presented is:

Whether the 11th Circuit decision in *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App.1a) is correct in holding that a preliminary injunction is relief on the merits, or whether the Fourth Circuit decision in *Smyth v. Rivero*, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002), is correct in holding that a preliminary injunction is not a ruling on the merits and thus cannot be the basis for prevailing party status?

Whether the Eleventh Circuit in *Wyner v. Struhs*,

179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App. 1a) was incorrect in affirming the district court's order finding that Respondents are prevailing parties where their request for permanent injunctive relief was denied, although at an abbreviated hearing Respondents were awarded interim relief?

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PETITION FOR A WRIT OF CERTIORARI

David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and Terrence Coulliette, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park, respectfully petition that a Writ of Certiorari be issued to review the judgment of the Untied States Court of Appeals for the Eleventh Circuit entered on April 25, 2006, in order to resolve a conflict between the Eleventh Circuit, which holds that a party who is successful only at the preliminary injunction stage can be a prevailing party, and the Fourth Circuit's decision in Smyth v. Rivero, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002) which holds that a obtaining a preliminary injunction cannot be the basis for prevailing party status and an award of attorneys fees under a fee shifting statute. The Court is squarely presented with a holding that a preliminary injunction alone, despite an adverse ruling on a permanent injunction, can satisfy the requirement for a ruling on the merits, and the court should reverse the 11th Circuit's decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is dated April 25, 2006, and it is not published in the Federal Reporter, but is published at *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11 (Fla.)). (App.1a) The order granting the preliminary injunction of District Judge Donald Middlebrooks, United States District Court for the Southern District of Florida, *Wyner v. Struhs*, 254

F.Supp.2d 1297, is dated February 27, 2003. (App.9a) The opinion of Judge Middlebrooks granting Defendants Motions for Summary Judgment, and finding plaintiffs are partially prevailing parties, is unreported. (App. 23a)

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 25, 2006. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on July 17, 2006. (App. 49a) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

The civil action was filed under the Civil Rights Act, 42 U.S.C. 1983, *et seq.* 42 U.S.C. §1988 provides in pertinent part: "In any action or proceeding to enforce a provision of section ...1983 [among other provisions], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs..." 42 U.S.C.A.§ 1988(b).

STATEMENT

This case has a long history arising out of Respondent's desire to appear nude in the John D. MacArthur Beach State Park in Palm Beach County, Florida. Florida Administrative Code Section 62D-

2.014(7)(b)[1], the "Bathing Suit Rule," provides that patrons in all areas of Florida's State Parks must at a minimum wear a thong and, if female, the equivalent of a bikini top. (App.9a) This suit arose when Petitioners informed Respondents that they would enforce the bathing suit rule and Respondents would not be allowed to perform nude plays and demonstrations at John D. MacArthur Beach State Park. Respondents brought suit arguing that nudity is inextricably entwined in their expressive activity, and thus, application of the bathing suit rule to their nude plays and demonstrations violates their Constitutional Rights. (App. 9a)

Prior to becoming a State Park, the beach in question was used by some to sunbathe nude. Since the site has been operated as a State Park, the State has enforced the rules applicable to all of Florida's State Parks, which are contained in Florida Administrative Code Section 62-D. The rule includes Section 62D-2.014(7)(b), the "Bathing Suit Rule", pursuant to which patrons of the park are required to wear minimum clothing, i.e., a bathing suit.

One of the Respondents in the underlying case, T.A. Wyner, has performed in and produced annual performances of a play, in which some performers are nude, depicting the history of the park and dramatizing the State's enforcement of the minimum clothing

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[1] Florida Administrative Code Section 62D-2.014(7)(b), the "Bathing Suit Rule", provides: In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

requirement. (App.9a) The play took place on a recurring basis after Respondent agreed to perform behind a cloth screen shielding park patrons who did not wish to be exposed to nudity. (App.9a) On at least one occasion, the nude participants did not remain behind the screen. (App.23a)

In 2001, Respondent requested that she be allowed to produce the play in the nude, and the attorneys for the State indicated that she could no longer perform in the nude at the park. In 2003, Respondent requested that she be allowed to produce a nude peace symbol at the park. On February 6, 2003, the park manager responded that she could not produce the peace symbol in the nude. (App.9a)

On February 12, 2003, Respondents filed a Complaint in the United States District Court for the Southern District of Florida, seeking relief in the form of a preliminary injunction preventing the Petitioners from interfering with the nude peace symbol two days later on February 14, 2003. The Complaint also sought declaratory relief, injunctive relief prohibiting interference with future expressive activities that may include non-erotic displays of nude human bodies; and compensatory and punitive damages. The one-count Complaint alleged that the Park Manager's denial of the request violated Respondents' Constitutional Rights under the First and Fourteenth Amendments. (App. 9a)

On February 13, 2003, less than 24 hours prior to the scheduled production, and one day after the Complaint was filed, a hearing was held in the district court on the preliminary injunction. The district court acknowledged the very short notice for the hearing. In-house counsel for the Petitioners appeared by telephone. At that hearing, the Court heard live

testimony from Respondent Wyner, and testimony by telephone from a State employee. After the hearing, the Court entered an Order granting Respondents' request for a preliminary injunction. (App.9a)

At the hearing on the preliminary injunction, the district court assumed content neutrality and applied the *O'Brien* test, first enunciated in *United States v. O'Brien*, 391 U.S. 367, 888 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The district court found that the total ban on nudity restricted more speech than necessary because there were less restrictive means to protect the State's interest in keeping the beach open to all patrons. The district court explained that nude performances had taken place at the park behind the screen, which was evidence of less restrictive means. (App. 9a)

The next morning, the production took place, without interference from Petitioners. As in the past, Respondent and the nude participants performed the peace symbol outside the confines of the screen. (App. 23a)

Subsequently, the case proceeded on Respondents' single-count Complaint, which requested a permanent injunction, declaratory relief and damages on both as applied and facial constitutional challenges to Florida Administrative Code Section 62D-2.014(18)[2],

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[2] Florida Administrative Code Section 62D-2.014(18), the "Free Speech Activities Rule" provides:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech

the "Free Speech Activities Rule", and 62D-2.014(7)(b), the "Bathing Suit Rule." Petitioners and Respondents filed Motions for Summary Judgment. After a hearing on the motions for summary judgment, the district court denied the Respondents' request for a permanent injunction, and denied all other relief to respondents, and granted summary judgment in favor of Petitioners as to all of Respondents claims. (App.23a) In reaching the decision not to enter a permanent injunction, the district court appied the *O'Brien* test again, and found that there were no less restrictive means than a total ban on nudity. The district court indicated that Respondent could no longer perform in the nude at the State park. (App. 23a)

Despite this ruling on the merits in Petitioner's favor, the district court found that the Respondents were prevailing parties, because they prevailed at the preliminary injunction stage, and awarded attorneys fees to Respondents.

Subsequently, Petitioners filed an appeal to the United States Court of Appeals for the Eleventh Circuit challenging the district court's finding that the Respondents are prevailing parties, the award of attorneys' fees, the award of a preliminary injunction, and the finding that the as applied challenge, on which the district court ruled at the preliminary injunction stage of the proceedings, was moot. (App.1a) The Eleventh Circuit affirmed the district court's award of

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activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

fees, finding also that Respondents were prevailing parties, because the ruling on the preliminary injunction was a ruling on the merits. Acknowledging that the standards for permanent and preliminary injunctions differ, the Eleventh Circuit Court of Appeals explained that although the Respondents "were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative." (App. 1a)

A timely Petition for Rehearing and Petition for Rehearing En Banc was also denied. (App. 49a) This Court should now consider the Petitioner's claim that the Respondents are not prevailing parties in light of the conflict between the Eleventh Circuit Court of Appeals, which found in this case that a preliminary injunction affords prevailing party status, and the Fourth Circuit's decision in *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2001), *certiorari denied by* 537 U.S. 825 (2002), which holds that a preliminary injunction is not a ruling on the merits can cannot establish prevailing party status. The Court is now presented with the opportunity to reverse the Eleventh Circuit's opinion that preliminary injunctive relief equates to a ruling on the merits.

REASONS FOR GRANTING THE PETITION

A. The Eleventh Circuit Court of Appeals' decision in *Wyner v. Struhs* is in conflict with the Fourth Circuit Court of Appeals' decision in *Smyth v. Rivero*

There is disagreement amongst the Circuit Courts of Appeal on whether a party who wins only preliminary injunctive relief is a prevailing party for purposes of an award of attorney's fees under fee-shifting statutes. The Fourth Circuit Court of Appeals in *Smyth v. Rivero*, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002), held that a preliminary injunction cannot form the basis of prevailing party status to support an award for attorneys' fees. In contrast, the Eleventh Circuit Court of Appeals in this case, and the D.C. Circuit Court of Appeals in *Select Milk Producers v. Johanns*, 400 F.3d 939 (D.C.Cir.2005), as well as other Circuit Courts of Appeals, have held that such preliminary relief can afford prevailing party status.

In *Smyth v. Rivero*, *id.*, the Fourth Circuit Court of Appeals held that the preliminary injunction in question could not meet the prerequisite for prevailing party status under 42 U.S.C. §1988. Moreover, the court explained that "[t]he preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated." *Id.*, p 277, ftnt. 8.

In that case, several recipients of the Aid to Families with Dependent Children (AFDC) program,

challenged a new policy enforced by the Virginia Department of Social Services which required an applicant to identify the father of the child for whom benefits were sought, or to list the first and last names of all individuals who might be the father. The plaintiff applicants were unable to identify the fathers of their children, and as a result of their inability to "cooperate" by identifying the fathers, their benefits under the AFDC program were reduced or eliminated. The applicants brought suit seeking temporary restraining orders, among other relief. The district court entered a preliminary injunction barring the State from enforcing the paternity identification policy against the plaintiffs, so that they continued to receive their benefits. In its order granting the preliminary injunction, the district court found that the plaintiffs were likely to succeed on the merits and the balance of harms favored the plaintiffs.

Thereafter, the Federal government changed its regulation, relaxing the standard for waiver of the identification of the father by the applicant. In addition, the new policy was modified so that it was prospective only, and thus no longer applied to the plaintiffs. The district court dismissed plaintiffs' claims as moot. The parties reached a settlement agreement with regard only to the Department's agreement not to seek repayment of benefits paid to plaintiffs prior to the modification of the policy.

Plaintiffs filed a motion for attorney's fees and costs, which was granted. The district court found that because the plaintiffs obtained a preliminary injunction and a partial settlement, they had prevailed, and were entitled to attorney's fees. The district court awarded the plaintiff nearly $200,000 in fees, and the State appealed the award of fees.

The appellate court found that "[w]hile granting such an injunction does involve an inquiry into the merits of a party's claim, ... the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Id.* at 276. Examining the requisite standard for granting a preliminary injunction, the court explained that a party is not required to succeed on the merits of their claim at that stage. "The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Id.*, at 276.

The Fourth Circuit Court of Appeals reasoned that to prevail at the preliminary injunction stage, a plaintiff must only demonstrate a strong showing or a substantial likelihood of success by clear and convincing evidence to obtain relief. *Id.*, at 276. In addition, in the preliminary injunction context, the court is required to weigh other factors in addition to the merits inquiry, that is, irreparable harm to the plaintiff, public policy considerations, and the balance of harm to plaintiff weighed against harm to defendants. The Fourth Circuit Court of Appeals held that the

> "interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[ ] on the merits' or something akin to one for prevailing party purposes."

Id., at 277, *citing Buckhannon*, 121 S.Ct. at 1840.

The decision in *Smyth v. Rivero* comports with this Court's decision in *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). In that case, the State of Texas appealed a preliminary injunction directing it to procure and compensate a qualified interpreter to assist a deaf graduate student. The Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. Although not part of the holding in the case, the Court's discussion of preliminary injunctions is instructive. The Court explained that Fed. R.Civ. P. 65(a)(2), governs preliminary injunctions, and provides that the finding of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits. *Id.*, 451 U.S. at 395, 101 S.Ct. at 1834. Moreover, the purpose of the preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Id.*

> "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary injunction hearing."

Id., 451 U.S. at 395, 101 S.Ct. at 1834, *citations omitted.*

When an expedited decision on the merits is appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a process by which the court can combine a hearing on the preliminary injunction and a trial, which requires at a minimum explicit notice that

the court intends to consolidate the hearing and the trial in order to afford the parties the full opportunity to present their respective cases. See *Rule 65 (a)(2) of the Federal Rules of Civil Procedure.* "In short, where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the merits of the controversy." *Id.* 451 U.S. at 396, 101 S.Ct. at 1834.

The Fourth Circuit Court of Appeals recognized the limitations inherent in a decision to grant a preliminary injunction, and held that accordingly, success at the preliminary injunction stage is not success on the merits. This rationale comports with this Court's opinion above.

The Fourth Circuit's analysis is also consistent with this Court's opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The opinion in *Buckhannon* provided guidance on the issue of preliminary injunctions and prevailing party status. *Buckhannon* dealt with whether or not the catalyst theory adopted by the Circuit Courts of Appeals with the exception of the Fourth Circuit was valid. The decision in *Buckhannon* held that the catalyst theory was an invalid basis for an award of fees, and that the prevailing party must be awarded a judgment on the merits, or to have obtained a court-ordered consent decree. *Id.*, at 604, 1840. Thus, this Court rejected the catalyst theory at least in part because it allowed recovery of fees without a demonstration of success on the merits.

As *Buckhannon* made clear, a prevailing party must have obtained a change in the legal relationship of the parties, and must have obtained relief on the merits. *Id.* Although an award of nominal damages may suffice, there have been no fees awarded where the reversal of the directed verdict or a judicial pronouncement that the defendant violated the constitution unaccompanied by judicial relief. *Id.*, at 1840, 605. The *Buckhannon* majority explained that prevailing party status is appropriate only where a party has obtained a judgment on the merits, or a court ordered consent decree. The Court did not include preliminary injunctions in the discussion of judicial recognition sufficient for entitlement to fees. Thus, *Buckhannon* infers that preliminary relief based on a likelihood of success on the merits is insufficient to establish prevailing party status.

In addition, the *Buckhannon* court expressly refused to abrogate the merit requirement of prior cases.

> "While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the 'merit' requirement of our prior cases and award attorney's fees where the plaintiff's claim 'was at least colorable' and 'not...groundless'. ...We cannot agree that the term 'prevailing party' authorized federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief."

Id., at 606, 1841 (citations omitted.) Therefore, although this Court did not reach the question of whether preliminary injunctive relief can qualify as relief on the merits, the decision in *Buckhannon* indicates that preliminary relief based on a prediction of success on the merits does not suffice.

The Fourth Circuit Court of Appeals' opinion in *Smyth v. Rivero* recognizes the limitations on the inquiry conducted to establish entitlement to a preliminary injunction, and correctly finds that such limited inquiry is not sufficient to establish that plaintiff has obtained relief on the merits. However, the Eleventh Circuit's decision in *Wyner v. Struhs*, (App.1a) and the other Circuit Courts of Appeal disagree, and hold instead that preliminary injunctive relief is relief on the merits for purposes of evaluating prevailing party status.

B. The Eleventh Circuit's decision in *Wyner v. Struhs*.

In *Wyner v. Struhs*, the instant case, the district court awarded fees to a party who won at the preliminary injunction stage, but lost at the permanent injunction stage. *Id.*, at 567. The court found that the order granting the preliminary relief afforded Respondents prevailing party status, and that she was thus entitled to attorneys fees.

The appellate court affirmed the district court's opinion, and determined that the court had awarded the preliminary injunction on the merits. Although the district court denied plaintiff's permanent relief, the Eleventh Circuit found that the award of attorney's fees was proper. *Id.* In its decision, the appellate court explained why the district court could conduct the same

legal analysis at both the preliminary injunction stage and the permanent injunction stage, and reach different results. "This result may be viewed through the lens of the different standards for preliminary and permanent injunctions: although Plaintiffs were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual success on the merits at the permanent injunction stage ..." *Id.*, at p. 569, Ftnt. 7. This statement demonstrates the crux of the disagreement between the holding in *Smyth v. Rivero* and the determination in this case that preliminary injunctions can support an award of fees to a prevailing party.

The Respondents lost on the merits after Petitioners were able to fully develop of a factual record and present their case on the merits. Emergency hearings and preliminary injunctions are not hearings and orders on the merits of a case, and only allow an abbreviated analysis of the case. Respondents should be required to achieve actual success on the merits before Petitioners are required to pay their attorney's fees. Otherwise, claimants are encouraged to file emergency pleadings, reducing their opponent's opportunity to develop their case. A victory after an emergency hearing against an opponent having a very limited opportunity to present a defense should not carry the same weight as a victory after a hearing on the merits with a fully developed record and opportunity to be heard. This case demonstrates the importance of a hearing on the merits after discovery and a fully developed record.

An abbreviated examination of the merits of the facts and the law at a preliminary hearing does not transform the emergency hearing to a hearing on the merits. In this case, the notice was short, the record

was incomplete, and there was insufficient time for the attorneys for the State to prepare their opposition to Respondents' case. Moreover, a party must show a substantial likelihood of success on the merits, and not success on the merits, in order to establish the elements for a preliminary injunction. The district court's ruling is not transformed into a finding on the merits because the court examined the substance of the parties' positions.

C. The other Circuit Courts of Appeals hold that a preliminary injunction determined 'on the merits' is sufficient to support a finding of prevailing party status.

Several other Circuit Courts of Appeal have applied *Buckhannon* to the question of whether preliminary injunctive relief can afford prevailing party status with differing results. Most hold that if the decision to award preliminary relief was based on an inquiry into the merits, prevailing party status is established. The D.C. Circuit in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), discussed a three prong test gleaned from the *Buckhannon* decision. Discussing *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486 (D.C.Cir.2003), the appellate court explained that "*Buckhannon* embraces three core principles for construing the term 'prevailing party' in federal fee shifting statutes: ..." *Id.*, at 946. The three principles are that 1) plaintiff must show a change in the legal relationship, 2) judgment must be rendered in the party's favor, and 3) there must be some judicial relief as opposed to merely a judicial pronouncement. *Id.*, at 947. The D.C. Circuit Court further explained,

> "In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make a plaintiff a 'prevailing party' under a fee shifting statute like the EAJA. Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can *never* transform a party in whose favor the injunction is issued into a 'prevailing party' under the EAJA."

Id., 400 F.3d at 945.

In applying the three prong test discussed above, the appellate court focused on the district court's finding that the Milk Producers "undoubtedly would have succeeded on the merits." *Id.* at 948. "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt." *Id.* In other words, the court's prediction of success on the merits was sufficient to confer prevailing party status.

Such a standard for establishing entitlement to fees poses a difficult test to perform. Federal courts would be required to establish one standard before entering a preliminary injunction, and a second standard to determine whether attorney's fees are available. Moreover, if the merits are actually litigated to final judgment, and there is no success on the merits, the inquiry should be irrelevant.

Other Circuit Courts of Appeal agree with the D.C. Circuit. For example, in *Watson v. County of Riverside*, 300 F.3d 1083 (9th Cir. 2002), plaintiff was a former deputy sheriff who was terminated after a

highly publicized incident of excessive force. After his return to the station, plaintiff was ordered to prepare a report without the assistance of an attorney or a union representative. Plaintiff filed suit for violation of his civil rights and seeking to keep the report from being introduced at the administrative hearing on his termination. Plaintiff won at the preliminary injunction stage of the proceedings and an order was entered preventing defendants from introducing the report at the administrative hearing. Thereafter, the district court dismissed all the claims, except for the claim for injunctive relief with regard to the hearing, which had already taken place. After the parties agreed the remaining claim was moot, the court dismissed the case. The district court found the plaintiff was a prevailing party, and awarded attorney's fees. The appellate court upheld the ruling, finding that "[a] preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*."

The Second Circuit Court of Appeals has also adopted an approach where a decision to award a preliminary injunction can establish prevailing party status if the determination is made on the merits. In *Haley v. Patacki*, 106 F.3d 478 (2nd Cir. 1997) the court held that "we do not automatically require a denial of attorney's fees when a party receives a stay or preliminary injunction but never obtains final judgment..." *Id.*, at 483. "Instead, a decision to award attorney's fees requires an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits." *Id.* Moreover, the court explained that "[a] determination of whether a court's action is governed by its assessment of the merits 'requires close analysis of the decisional circumstances and reasoning underlying the grant of

preliminary relief." *Id.*, at 483, quoting *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994).

These cases demonstrate that although a determination of entitlement to preliminary relief can include an examination of the merits, a preliminary injunction is granted when a party establishes only the lesser standard of a likelihood of success on the merits. Thus, according to the Circuit Courts of Appeal with the exception of the Fourth, it follows that if a party prevails on the lesser standard of likelihood of success on the merits, the party will be entitled to attorney's fees. That standard is inconsistent with this Court's previous holdings that the standard must be success on the merits. *Buckhannon, id.; Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672 (1987).

D. Respondents are not prevailing parties under *Smyth v. Rivero*.

In this case, the Eleventh Circuit found that Respondents had established a likelihood of success on the merits, but were unable to achieve actual success on the merits. *Wyner v. Struhs*, 179 Fed.Appx. at 569, Ftnt. 7. (App.1a) This case demonstrates that likelihood of success on the merits does not equate with success on the merits. Applying the standard discussed in *Smyth v. Rivero*, Respondents are not prevailing parties because they lost on the merits of their claims. Respondents convinced the district court at an emergency hearing, which Petitioners attended by telephone, and of which Petitioners were given almost no notice, that their Constitutional rights were violated by restricting them from performing plays and demonstrations in the nude at the park. After full development of the facts, and time for Petitioners to

prepare and present their case, the district court found exactly the opposite: That restricting Respondents from performing in the nude did not violate their Constitutional rights. Therefore, Respondents did not prevail on the merits, they are not entitled to attorney's fees.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 04-14750
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

Versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

April 25, 2006, Decided

April 25, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For David B. Struhs, Terence Coullitte, Appellants: Carri S. Leininger, Williams Leininger & Cosby P.A., WEST PALM BCH, FL.

For Terence Coullitte, Appellant: Barbara Jeanne Taggart, Williams Leininger & Cosby, WEST PALM BCH, FL.

For T. A. Wyner, Appellee: Randall C. Marshall, American Civil Liberties Union of Florida, Miami, FL.

For George Simon, Appellee: James K. Green, James K. Green, P.A., WEST PALM BEACH, FL.

JUDGES: Before EDMONDSON, Chief Judge, BARKETT, Circuit Judge, and HUNT, * District Judge.

OPINION: PER CURIAM:

This appeal raised the issue of whether Plaintiffs can be a "prevailing party" and awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs obtained a preliminary injunction that prevented state park officials from interfering with Plaintiffs' enactment of a nude peace symbol at a public beach. But later in the case at summary judgment, Plaintiffs lost their facial claims against the state rules that prohibited nudity at the beach and that gave park officials power to enact reasonable time, place, and manner restrictions on expressive activity. The district court denied Plaintiffs permanent relief. Defendants therefore appeal the district court's award of attorney's fees to Plaintiffs for Plaintiffs' success in obtaining the preliminary injunction.[1]

To qualify as a prevailing party, the plaintiff must obtain the primary relief sought in the case. *Taylor v. City of Ft. Lauderdale,* 810 F.2d 1551, 1555-56 (11th Cir. 1987). Taylor said that "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees." *Id.* at 1558. As an initial matter, we accept that the

preliminary injunction in this case decided a substantive issue -- whether or not the state officials could arrest the nude peace symbol participants -- and thus was on the merits.

The more important question now is whether the district court granted the preliminary injunction based on a mistake of law. Defendants claim that the district court conducted identical legal analyses on identical facts but reached different results on the motions for preliminary and permanent injunctions. If the preliminary injunction was based on a mistake of law such that Plaintiffs "were never actually prevailing parties at all[,]" *id.* at 1558, then Plaintiffs are entitled to no attorney's fees. For example, in Doe v. Busbee, this Court determined that despite obtaining preliminary and permanent injunctions and summary judgment, the plaintiffs were not prevailing parties under section 1988, because two Supreme Court decisions preexisting the award of attorney's fees countered the district court's reasoning in issuing the injunctions and prompted the injunctions and judgment to be vacated under rule 60(b). 684 F.2d 1375, 1381 (11th Cir. 1982). Therefore, the Busbee court reversed the award of attorney's fees. *Id.* at 1382-83.

In the instant case, Plaintiffs raised both as-applied and facial challenges to Fla. Admin. Code Ann. r. 62D-2.014(7)(b),[2] prohibiting nudity at the beach, and to Fla. Admin. Code Ann. r. 62D-2.014(18),[3] allowing state park officials to regulate the time, place, and manner of expressive conduct at the beach. On their as-applied challenge, Plaintiffs obtained a preliminary injunction that prohibited Florida officials from interfering with Plaintiffs' one-time enactment of a nude peace symbol

at a public beach. The district court assumed for the sake of the preliminary injunction order that the rules were applied in a content-neutral manner n4 and, thus, applied the test set out in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), to evaluate the validity of the restrictions. According to the pertinent written order, the court granted the injunction because a settlement agreement from previous litigation between the parties showed a less restrictive alternative to a total ban on nudity: Plaintiffs could perform the nude peace symbol on an area of the beach that would be hidden behind a cloth screen. This approach would allow the expressive conduct, but protect the public from the offense of nudity. The Defendants' attorney conceded at the preliminary injunction hearing that this approach might be an acceptable alternative.

Later at summary judgment, Plaintiffs lost their facial challenge to Fla. Admin. Code Ann. r. 62D-2.014(7)(b).[5] Plaintiffs' attorney admitted at the hearing that Plaintiffs and other participants had not remained behind the cloth screen during the nude peace symbol demonstration, and a fair reading of the record shows that Plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works. In the summary judgment order, the district court again applied the O'Brien test but -- based on these new developments -- said a total ban on nudity was no greater than was essential to further the government's interest in protecting the public from the offense of nudity, because "Park authorities were . . . unable to ensure that those engaged in the expressive conduct stayed behind the screen."[6] The court did award attorney's fees to Plaintiffs for the work they

expended obtaining the preliminary injunction, however.

We have reviewed the record for abuse of discretion and conclude that no reversible error occurred. Although in both orders, the district court applied the O'Brien test, in the summary judgment order the court relied on new facts presented at the summary judgment hearing which demonstrated that the less restrictive alternative was not sufficient to protect the government's interest.[7] Thus Plaintiffs did not earlier obtain the preliminary injunction based on a mistake of law.

Plaintiffs are entitled to prevailing party status and attorney's fees because the court granted the preliminary injunction on the merits and Plaintiffs obtained the primary relief they sought. *Taylor v. Ft. Lauderdale*, 810 F.2d at 1555-56, 1558. The district court properly limited the fee award to the degree of Plaintiffs' success. See *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983) (saying degree of success is the most important factor in determining amount of attorney's fees).

AFFIRMED.

* Honorable Willis B. Hunt, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

n1 Defendants' challenges to the underlying preliminary injunction are moot because the injunction was about a finite event that occurred and ended on a specific, past date. See *Johnson v. Fla. High School*

Activities Assoc., Inc., 102 F.3d 1172 (11th Cir. 1997) (concluding challenge to injunction allowing age-ineligible high school student to play high school football was moot after the student's final football season ended).

n2 The full text of the regulation says, "In every area of a park including bathing areas no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering."

n3 The full text of the regulation says, "Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity."

n4 The district court said in the summary judgment hearing and wrote in the summary judgment order that the earlier preliminary injunction was based on testimony that indicated that Defendants were applying the rules in a content-based manner because the peace symbol was an anti-war protest. But, in the actual order granting the preliminary injunction, the

court said it was not necessary to determine whether the rules were applied in a content-based manner, and assumed content neutrality for the purposes of the order. Although the court's statements in the later summary judgment hearing and order about the reason for the earlier preliminary injunction were incorrect, that does not mean that the preliminary injunction was based on a mistake of law.

n5 Plaintiffs also lost their facial challenge to Rule 62D-2.014(18), because it gave the park manager discretion only about the time, place, and manner of free speech activities, not discretion to prevent free speech activities.

n6 We recognize that at the preliminary injunction hearing, one of the plaintiffs mentioned that on another occasion a few years earlier, not all the participants in a nude expressive work had remained behind the provided cloth screen because participants thought they had "already clarified [with Park officials] that the screen had a chilling effect." This circumstance does not change our analysis, however, because it did not express that Plaintiffs had decided to dishonor the settlement agreement and would refuse to remain behind a cloth screen if one were set up for the nude peace symbol. In addition, Defendants conceded at that hearing that the cloth screen might be sufficient to protect Defendants' interests.

n7 This result may also be viewed through the lens of the different standards for preliminary and permanent injunctions: although Plaintiffs were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual

success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative.

Case No. 03-80103-CIV-MIDDLEBROOKS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

T.A. WYNER and GEORGE T. SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

February 27, 2003, Decided
February 27, 2003, Filed

COUNSEL: For T. A. WYNER, GEORGE SIMON, plaintiffs: Randall C. Marshall, American Civil Liberties Union, Miami, FL.

For T. A. WYNER, GEORGE SIMON, plaintiffs: James Kellogg Green, James K. Green, West Palm Beach, FL.

For DAVID B. STRUHS, TERENCE COULLITTE, defendants: James Orrin Williams, Jr., Barbara Jeanne Taggart, Williams Leininger & Cosby, West Palm Beach, FL.

JUDGES: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: DONALD M. MIDDLEBROOKS

OPINION:

CORRECTED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE comes before the Court upon Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, filed February 12, 2003. The Court has reviewed the record, heard argument and received evidentiary submissions at a hearing, and is otherwise fully advised in the premises.

Plaintiff Wyner comes before this Court seeking an order prohibiting state park officials at John D. MacArthur Beach State Park ("Park") from arresting her or otherwise interfering with her planned "temporary art installation comprised of nude bodies in the form of a peace sign" scheduled for February 14, 2003.[1] Plaintiff Simon is a videographer who plans to attend the event and seeks to view it in its planned format. (Simon Aff. PP 3, 7). Defendants have indicated that they will not permit the event to take place, or at least, that they consider the event as described to be a violation of park rules. This is not the first time Wyner has sought to engage or has engaged in nude activities at the Park. In fact, Wyner has a long history of engaging in such activity that dates back at least thirteen years. These events have been met at times with the threat of arrest and later, with cooperation or at least tolerance. Based on the Park's response to Wyner's recent notice of her plans, any period of

cooperation or tolerance has come to an end. Some historical background of this relationship is helpful to understanding the context of this motion.

The Park is a recreation area including nature trails and a beach among other attractions. Part of it sits on land that, prior to state control, was considered a "clothing optional" beach. *See McGuire v. State, 489 So. 2d 729, 730 (Fla. 1986).* In 1990, Wyner and others went to the Park to engage in a protest of recently adopted clothing and speech restrictions. Wyner, not in violation of the rules on attire, was clothed only in an opaque copy of the *Bill of Rights*, and spoke in favor of the rights protected by the *First Amendment.* She was arrested and charged with disorderly conduct, but those charges were later dropped for lack of probable cause. Wyner instituted a civil rights violation suit and was awarded damages, but that result was later overturned on appeal on the basis that park officials were entitled to qualified immunity. *See DeWald v. Wyner, 674 So. 2d 836 (Fla. 4 Dist. Ct. App. 1996).* In 1991, Wyner directed and performed in a play at the Park entitled MacArthur: The Man and the Beach which included nude scenes. Wyner and others were arrested, but again, those charges were dismissed. In 1995, she and Plaintiff Simon instituted civil [**4] rights actions for damages in connection with those arrests and the termination of the play. The Simon case reached a settlement which, in pertinent part, included the following terms

> 2. While defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is

> generally protected by the *First Amendment* subject to reasonable restrictions on time, place and manner.
> 3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A. Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park.
> 4. The play shall be performed at least 100 yards north of the northernmost boardwalk on the beach in an area from the dune line to the ocean.
> 5. Plaintiff and his representatives shall arrange for placement of a bolt of cloth in a semi-circle around the area where he play will be performed.
> 7. At least fourteen (14) days before the play, T. A. Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

(Pls.' Compl. Ex. 1). At least twice, Wyner has directed and performed in the play, both with and without nudity and both with and without the cloth screen described in the settlement, without arrest or incident.

On January 29, 2003, apparently in the continued spirit of cooperation, Wyner sent an email to Defendant, Park Manager Terrence Coulliette, notifying him of her intentions with regard to the event

planned on February 14, 2003. (Pls.' Compl. Ex. 2). The entire event is scheduled to last approximately three hours with the actual exhibition lasting less than half that time. *Id.* Wyner estimated approximately fifty participants in the event. *Id.* The initial email response from Defendant Coulliette appeared promising, including the statements that "I am sure everything will work out fine, as we communicate effectively, and seek cooperation and understanding ...." and "I do not anticipate any problems at this time." (Pls.' Compl. Ex. 3). However, problems appear to have arisen. The next communication from Defendants stated in part as follows:

> At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the *First Amendment*. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. You are of course free to conduct your activities, absent the nudity.

(Pls.' Compl. Ex. 4). The questions presented before this Court then are, judging on the standards applied to a preliminary injunction motion, whether the planned activity is indeed expressive conduct, and if so, whether the restrictions, as applied to this activity, are permissible, and thus whether Defendants' prevention of the event would be a *First Amendment* violation.

The legal standard for a preliminary injunction pursuant to *Federal Rule of Civil Procedure 65(a)* is as follows. The moving party must demonstrate (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that, if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)*; *McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)*. "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the four prerequisites." *McDonald's Corp., 147 F.3d at 1306* (internal citations and quotations omitted).

The primary consideration for this Court in addressing the present motion is whether, if Defendants do prevent the planned event, a violation of Plaintiffs' *First Amendment* rights will occur. Addressing the four burdens for a preliminary injunction motion in reverse order in order to resolve efficiently several steps in the process, it is first recognized that, if suppression of this activity would be unconstitutional, allowing that to happen would be adverse to the public interest. Alternatively, permitting the event to go forward will benefit the public interest. *See, e.g., Stromberg v. California, 283 U.S. 359, 369, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)* [**8] ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

essential to the security of the Republic, is a fundamental principle of our constitutional system."). The threatened injury to the movant in this case also outweighs whatever damage the proposed injunction may cause the opposing party. Again assuming a constitutional violation, that injury far exceeds the logistical or practical difficulties that may be faced by defendants, especially given that no group tours and no special events are planned in the Park during the time for the event. (Compl. Ex. 2). The question of irreparable harm is also answered in the affirmative in this context. "The loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* (citing *New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971))*. Thus, this Court is left with only the first question in the preliminary injunction test: whether Plaintiffs have shown a substantial likelihood of success on the merits.

The Court is presented first with a question as to the nature of the conduct. With regard to the initial question whether the proposed activity is in fact expressive conduct that is protected under the *First Amendment*, the answer is yes. Nude overtly political speech in the form of a "living nude peace symbol" is expressive conduct well within the ambit of the *First Amendment*. Artistic endeavors involving nudity as part of their expression such as the musical *Hair* have been accorded *First Amendment* protection. *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557-558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)*. Wyner, in her testimony, explained her planned event and the importance of nudity to its concept as a means

of demonstrating the nonthreatening nature of the event and the vulnerability of peace and the participants. Wyner related this explanation to her history of anti-war activity dating back to the Kent State shootings in 1970 and the understandable desire to communicate this message, as well as the absence of weapons at the event, both to the audience and to authorities.

It has previously been held that the Park is a public forum. *Naturist Society, Inc. v. Fillyaw, 958 F.2d 1515, 1521-23 (11th Cir. 1992).* That said, some reasonable restrictions may be placed on the exercise of *First Amendment* rights. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).* Those restrictions may relate to the time, place and manner of the conduct. *Id.* The validity of those restrictions is judged by the following test: whether the restriction (1) is justified without reference to the content of the regulated speech; (2) serves a significant government interest; (3) is narrowly tailored to serve that interest; (4) leaves open ample alternative channels for communication of the information. *Id. at 293.* The regulations in question here are the Department of Environmental Protection rules prohibiting nudity on the beach and governing free speech activities. FLA. ADMIN. CODE ANN. r. 62D-2.014(7)(b) and FLA. ADMIN. CODE ANN. r. 62D-2.014(18).

First, are these rules content neutral? Plaintiffs have raised a cloud over Rule 2.014(18) and the apparently unchecked discretion provided to the Park Manager in consultation with Department lawyers. Rule 2.014(7)(b) prohibits nudity as defined in this section with regard to bathing and swimming. Plaintiffs

made the important point that nudity in free speech activities has been permitted in the past under Rule 2.014(18) and thus, that a plausible interpretation of the nudity prohibition relates only to bathing and swimming activities as that section is titled under Rule 2.014(7). The question of whether these rules have been consistently applied in a content neutral fashion involves a more fact-specific analysis of the pattern of implementation, and at least some of the testimony received at the hearing indicates that content neutrality may not be present. The Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or antiwar protest. Since an answer to that question is not essential to this analysis, however, it is not further addressed herein. Content neutrality is hereafter assumed only for the purposes of this order.

The *O'Brien* test has been applied to determine the validity of content neutral restrictions. *See City of Erie v. Pap's A.M., 529 U.S. 277, 289-90, 146 L. Ed. 2d 265, 120 S. Ct. 1382.* The *O'Brien* test requires that the regulation (1) be within the government's constitutional power to enact; (2) further a substantial or important government interest; (3) is unrelated to the suppression of free expression; (4) is no greater than is essential to further the government interest. n2 *Id.*

Does the regulation serve a significant government interest? The answer depends on the interest being served, and here the answer is again in the affirmative. The prevention of nudity in a state park may serve multiple interests. Preventing preemption of clothed bathers from using the park, protection of the public

from the 'offense' of nudity, and park preservation and aesthetics may all serve as substantial or important government interests. Here, the Defendants have given clear indication of the interest they believe the rule serves. The letter sent to Plaintiff by Defendant Coulliette is clear that the state "has a significant interest in keeping the entire park open to all visitors during operating hours ...." That letter went on to state, "you are of course free to conduct your activities, absent the nudity," indicating that the sole obstacle to achieving the state's interest is neither the space occupied by the event nor any other aspect of the event except the nudity of the participants. (Compl. Ex. 4). That interest in protecting the public from the potential offense of nudity meets this standard.[3]

Is this rule sufficiently narrowly tailored to serve that interest? The question of narrow tailoring is one of whether the restriction "burdens substantially more speech than is necessary to further" the state interest. *Ward v. Rock Against Racism, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* In many cases, this question is a theoretical one that must be answered by measuring the governmental rule against hypothetical less restrictive alternatives that have been neither tried nor tested and have not been demonstrated to effectively serve the government's interest. Here, that is not the case, and that factual distinction indeed makes all the difference in the outcome of this case as compared to other cases involving nudity and expression. There have already been instances of nude expression allowed in the Park. The settlement lays out a number of agreed-upon manner restrictions that are far less restrictive than the total ban on nudity in the Park.[4]

Acknowledging the above facts and the demonstrated less restrictive alternatives, it is impossible to maintain the total ban on nudity as a reasonable restriction on the manner in which the "living nude peace symbol" may be presented. The present restriction prevents this form of expression in full. While a living peace symbol might still be performed, a nude one is totally and unnecessarily prohibited. The choice need not be either/or. Plaintiffs' desired expression and the interests of the state may both be satisfied simultaneously. Reaching that determination, the Court finds that Plaintiffs have clearly satisfied the burden of persuasion of showing a likelihood of success on the merits of this case.[5]

In many respects, this case may seem trivial, but it also raises serious issues of freedom and expression. The value of freedom is found not only in the larger issues of life but also in the fanciful and strange. Events like Fantasy Fest in Key West and the Mango Strut in Miami may not be to everyone's taste, but they add to the spice of life in South Florida that for the most part, we enjoy. For several years at MacArthur Park, the Plaintiff, at times wearing nothing but the *Bill of Rights*, has been disrobing as part of her expression. Her actions have been tolerated by the state. Protesting a potential war through naked protest seems a bit quixotic, but it is also part of the freedom that both those supporting the war and those who oppose it seek to protect. Defendants shall neither prevent nor interfere with Plaintiffs' planned event on February 14, 2003. The Court wishes to make clear, though, that this injunction does not preclude the posting of notices or signs advising Park visitors of the

occurrence of this event nor the use of other measures used in the past with respect to the play.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction is GRANTED. The parties have agreed that security is not necessary in this instance and therefore, none will be required.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27th day of February, 2003.

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

Footnotes

n1 This activity may be described both as art and as political advocacy. As the February 12, 2003 edition of the *Palm Beach Post* described the event in an article entitled *Nude Protest Against War*

> Washington is on a war footing, and after years in dresser drawers and scrapbooks and boxes filled with mementos, peace signs are reappearing. Antiwar rallies will be held in many cities this weekend and many Palm Beach Countians are heading to Washington. Those wishing to make a point here can visit MacArthur Beach State Park on Friday morning. Organizers expect to create a "Living Nude Peace Sign" around 11 a.m. T.A. Wyner, longtime

> advocate of clothing-optional beaches, is coordinating the event, which is being held in conjunction with the annual Midwinter Naturist Festival at Sunsport Gardens in Loxahatchee. 'We don't know how many people we'll get,' festival organize Morley Schloss said. 'If we get a lot we'll have a big sign. If we don't we'll have a smaller one. But we'll still make our point. We expect people to join us who are not part of the festival as well.'

n2 The factors of the *O'Brien* test are organized differently, however the crucial analysis and the result in this case would be essentially the same regardless of which test were applied. This Court applies the time, place or manner analysis with regard to a public forum.

n3 Additional indication of the predominance of this state interest exists in the form of the settlement referred to above. In the settlement, the state agreed to permit nudity on the beach, however it insisted upon distance restrictions from busier areas and a cloth barrier to prevent unwilling exposure to the nudity. Thus, in this case, it is not nudity itself that the state seeks to prevent on the basis of moral objection (as Justice Scalia has theorized for other anti-nudity rules *See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575, 115 L. Ed. 2d 504, 111 S. Ct. 2456*). Rather it is the offensive effect that nudity might have on others that the state hopes to eliminate. *See id. at 590-91* (White, J., dissenting).

n4 Plaintiff has indicated displeasure with those restrictions, however it is not the job of this Court to

mandate any less restrictive alternatives. It is sufficient that less restrictive alternatives exist that can be and have been put in place which allow significantly more expressive conduct for this Court to decide that the current rule if applied to the present factual circumstances would be unconstitutional. Now is not the time to consider the full range of possibilities. If, in the future, the Park adopts a less restrictive alternative and Plaintiffs or others are not satisfied with that rule, that rule may be challenged at that time.

n5 Plaintiffs also identify alternative bases for success on the merits. Plaintiffs challenge the rule and its application as not neutral with respect to content. They also suggest a facial attack on the validity of the manner restriction determination made by the Park Manager pursuant to FLA. ADMIN. CODE ANN. r. 62D-2.014(18) and possibly that the ability of the Manager to make case by case restrictions without substantial limits to his discretion may indicate an invalid prior restraint. This Court does not address those further but neither does it determine that those bases are not valid.

1/28/2004
Case No. 03-80103-CIV-MIDDLEBROOKS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

T.A. WYNER and GEORGE T. SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendants' Motion for Summary Final Judgment (DE 45), filed November 17, 2003 and Plaintiffs' Motion for Summary Judgment (DE 55), filed December 8, 2001 The Court has reviewed the record and is otherwise fully advised in the premises.

The case is another chapter in the struggle between the State's power to provide for the public health, safety and, moralsfn1 of its citizens, and certain Floridians' desire to express themselves. John D. MacArthur Beach State Park is a multi-use, public, state park.

Despite a history of working together and strong connectedness to the park and its beneficial utilization the Defendants, representatives of the Florida Department of Environmental Protection. ("DEP"), and Plaintiffs, private citizens, have reached an impasse over a decisive question, whether the State's regulation banning nudity In public parks amounts to a, constitutional general ban on conduct, or an impermissible violation of the First Amendment's guarantee of freedom of expression The Court finds that although the First Amendment guarantees freedom of speech, it also allows for incidental limitations on freedom of expression based on sufficiently important governmental interests in regulating conduct.

Facts

Plaintiff Wyner and Plaintiff Simon have a long history of expressive conduct within John D. MacArthur Beach State Park ("Park) that dates back at least thirteen years, These events have been met at times with the threat of arrest and later, with cooperation or at least tolerance Some historical background of this relationship is helpful to understanding the context of this motion.

The Park is a recreation area including nature trails and a beach among other attractions, Part of it sits on land that, prior to state control, was considered a "clothing optional" beach. See McGuire v. State, 489 So, 2d 729, 730 (Fla. 1986), In 1990, Ms, Wyner and others went to the Park to engage in a protest of recently adopted clothing and speech restrictions. Ms. Wyner, not in violation of the rules on attire, was clothed only

in an opaque copy of the Bill of Rights, and spoke in favor of the rights protected by the First Amendment. She was arrested and charged with disorderly conduct, but those charges were later dropped for lack of probable cause. Ms. Wyner instituted a civil rights violation suit and was awarded damages, but that result was later overturned on appeal on the basis that park officials were, entitled to qualified immunity. See DeWald v. Wyner, 674 So. 2d 836 (Fla. 4 Dist. Ct. App. 1996). In 1991, Ms. Wyner directed and performed in a play at the Park entitled MacArthur, The .Man and the Beach which included nude scenes. Ms. Wyner and others were arrested, but again, those charges were dismissed, In 1995, she and Plaintiff Simon instituted civil rights actions for damages s in connection with those arrests and the termination of the play. The Simon case reached a settlement which, in pertinent part, included the following terms:

2. While defendants do not condone or encourage nudity at John D. MacArthur each State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner.

3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A, Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park.

4. The play shall be performed at least 100 yards north of the northern most boardwalk on the beach in an area from the, dune line to the ocean,

5. Plaintiff and his representatives shall arrange

for placement of a bolt of cloth in a semi-circle around the area where the play will be performed.

7. At least fourteen (14) days before, the play, TA, Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

(Pls.' Exh. 1). At least twice since the settlement, Ms. Wyner has directed. and performed in the play, both with and without nudity and both with and without the cloth screen described above, without arrest or incident, (Wyner Depo. at 51-52). The actions giving rise to this suit began in 2003.

Florida Administrative Code Rule 62D-2.014 (I8), the "Free Speech Activities Rule" provides:

Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's, natural. or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring that the time of the free speech activity.

FLA. ADMIN. CODE ANN. r. 62D-2.014(18), The parties agree that Defendant Coulliette was at all material times hereto an employee of the DEP and the

park manager of the John D. MacArthur Beach State Park, In mid-January, Ms, Wyner called Mr. Coulliette to inform him that on Valentine's Day she intended to produce a temporary art installation comprised of nude bodies in the form of a peace sign. After discussing her plans with his supervisor, Mr. Coulliette requested that Ms. Wyner provide a written request. On January 29, 2003, Ms. Wyner sent an email to Mr. Coulliette notifying him of her intentions with regard to the event planned on February 14, 2003, (Pls.' Exh. 2).

Mr. Coulliette responded by email that he would forward Ms. Wyner's request to the Bureau Chief (Pls. Exh. 3). Subsequently, Mr. Coulliette indicated by letter dated February 6, 2003, that the DEP would allow the production, but required adherence to the clothing requirements of the Florida Administrative Code's bathing suit regulation. (Pls.' Exh. 4). This communication from Defendants stated in part:

At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction You are of course free to conduct your activities) absent. the nudity. You must wear the minimal amount of clothing in the Park as required by section 62D2.014(7)(b).

(Pls.' Exh. 4), Florida Administrative Code Rule 62D-2,014(7)(b), known to Defendants as the "Bathing Suit Rule" and to Plaintiffs' as the "Bathing and Swimming"

rule, provides:

In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

FLA. ADMIN. Code ANN. r. 62D-2.014(7)(b).

On February 12, 2003, Plaintiffs filed the Complaint (DE 1) and Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction (DE 4) seeking Court intervention to prevent state park officials from interfering with expressive activity containing nudity. (Pls.' Compl. Par. 1). On February 13, 2003, this Court issued an Order prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation.fn2 After the Court's ruling on February 13, 2003, Mr. Coulliette did not interfere with the temporary art installation on February 14, 2003. (T.A. Wyner Depo. at 24, 26, 49, 51).

Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to Judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. See Adickes v. S.H. Kress, & Co., 398 U.S. 144, 157 (1970). In applying this standard., the evidence, and all reasonable factual inferences drawn therefrom, must be viewed in the light most

favorable to the nonmoving party. See Arrington v. Cobb County, 139 F. 3d 865, 871 (11th Cir. 1998); Allen v. Tyson Foods, Inc., 121 F. 3d 642, 646 (11th Cir. 1997).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of their claims, such that a reasonable jury could find in their favor. See Earley v. Champion 1110 Corp., 907 F. 2d 1077, 1080 (11th Cir. 1990). The non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleadings, but [its] response... must set forth specific facts, showing that there is a genuine issue for trial." FED. R. Civ. R 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the Jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), Further, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an, issue of fact for
trial. sufficient to defeat a well supported summary judgment. See Earley, 907 F.2d at 1081, The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment See Celotex, 477 U.S. at 322. It is from this point that we begin our analysis.

Defendants' Motion for Summary Final Judgment

Count I Against Defendant Coulliette Individually.

Plaintiffs allege that Mr. Coulliette forwarded Ms. Wyner's request to his supervisors, and informed her of the Department's decisions regarding time, place and

manner restrictions. (Pls.' Compl, Pars. 30-33). Plaintiffs seek monetary damages in an amount less than twenty (20) dollars against Mr. Coulliette. He asserts a defense of qualified immunity. (Defs' Ans. at 5.), Qualified immunity protects a government official acting in his official capacity unless he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]., Harlow v. Fitzgerald, 457 U.S, 800, 815 (1982)(internal citations omitted), This defense for officials protects against "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Harlow, 457 U. S. at 814 (1982)(internal citations omitted).

The analysis of a qualified Immunity defense is twofold. First., the defendant official must prove that the relevant conduct occurred while lie was acting within the scope of his discretionary authority. Second, if the official does so prove, the plaintiff must prove that the conduct violated clearly established law. Harbert Intern., Inc., v. James, 157 F. 3d 1271, 1280-81 (11th Cir. 1998); Evans v. Hightower, 117 F. 3d 1318, 1320 (11th Cir. 1997).

Qualified immunity is available to officials acting within the scope of their authority and pursuant to the performance of duties within the scope of that authority. All parties agree that Defendant Coulliette was at all material times a park manager employed by the DEP and acting under color of state law. Plaintiffs, however, contest that Mr. Coulliette was acting within the scope of his discretionary authority. They correctly

point out that it was not specifically Coulliette who made the decision regarding the DEP's reaction to the nude protest, nor did he write the draft of the February 6 letter, Coulliette Depo. at 109). While this is true, they do agree that it was in fact Mr. Coulliette who sent Ms. Wyner the final version of the letter. (pls. Exh. 4). Moreover, as the park manager, when he told Ms. Wyner in the February 6 letter that she would be required to adhere to Rule 62D-2.014(7)(b) on February 14, 2003, he was acting within the scope of his discretionary authority as defined by Rule 62D-2.014 (18), which states that the "park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity." Although Mr. Coulliette was not the only or even primary person involved in making the decision does not alter that fact that such decision making is within the scope of his discretionary authority as legally defined in Rule 62D-2.014(18).

Because we find that Mr. Coulliette was acting within the scope of his discretionary authority, the Court now examines whether he violated clearly established law. In order to determine if Mr. Coulliette violated clearly established law, the Court must evaluate whether the facts alleged, taken in the light most favorable to the party asserting the injury, show (1) violation of a constitutional right and (2)that the right was clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, 457 U.S. at

818 (1982), We now determine whether Mr. Coulliette violated clearly established law.

The question to be answered is whether it was clearly established as of February 2003 that Mr. Coulliette's attempt to enforce the bathing suit rule and the free speech activities rule would violate Plaintiffs' rights. The Court finds that it was not. The Court declines to address whether Mr. Coulliette's actions were constitutional. It does, however, find that it was not already established that Mr. Coulliette's actions were unconstitutional. Given the state of the law, would be reasonable for Mr. Coulliette to believe he was acting legally, first, clearly established Supreme Court precedent provides that even in a public forum, the government may impose reasonable restrictions on the time, ,place, manner of protected speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Second, in Frandsen v. Department of Environmental Protection., 829 S.2d 267(Fla. 1st DCA. 2002), the First District Court of Appeals of Florida held that Florida Administrative Code 62D-2.014(18), the "Free Speech Activities Rule" was not an unconstitutional restriction on free speech. Thus, Mr. Coulliette cannot be found to have violated clearly established law. Furthermore, the Eleventh Circuit has stated that if "applicable law is unsettled, immunity necessarily results," Nicholson v. Georgia Dept. of Human Resources, 918 F. 2d 145, 147 (11th Cir. 1990). The Court finds that Mr. Coulliette's actions did not violate clearly established law. Accordingly the Court finds in favor of Defendant Coulliette on Count I as against him personally.

Count I Against Defendants In Their Official Capacities

Defendants allege that under the following theory, they are not proper 42 U.S.C. 1983 defendants: (1) because they are being sued in their official capacities, Plaintiffs are actually suing the state and (2) states are not proper Defendants under 42 U.S.C 1983, Defendants are incorrect. Individual suits that seek prospective relief for ongoing violations of federal law may be levied against state officials, Ex Parte Young, 209 U.S. 123, 159-60 (1908); Will v. Michigan Department of State Police, 491 U.S. 58, 71 Fn 10 (1989); Tennant v. Florida, 111 F. Supp. 2d 1326, 1330 (2000). For this reason, the Court finds against Defendants on Count I as against them in their official capacities.

Plaintiffs' Motion for Summary Judgment

Introduction

Plaintiffs seek three permanent injunctions. They ask that Defendants, and anyone acting in concert with defendants, be permanently enjoined: (1) from preventing, or interfering with., free speech activities within the John D. MacArthur Beach State Park which include innocent, non-erotic nudity; (2) from seeking to enforce Florida Administrative Code 62D-2.014(7)(b) as a reasonable manner restriction to free speech activities within the Park; and (3) from seeking to utilize Florida Administrative Code 62D-2-.014(l8) to promulgate ad hoc time, place or manner restrictions without a narrowly tailored set of standards or guidelines. Plaintiffs also seek declaratory relief consistent with the proposed injunctions.

Plaintiffs' bring both facial and as applied challenges to the park, restrictions. at issue in this suit. The Court

ruled in Plaintiffs favor on their prayer "for injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003," (Pls. Compl. Par. (43)(a)). Federal Rule of Civil Procedure 65(d) requires each preliminary injunction to "be specific in terms." The Court's Order granting Plaintiffs' motion prevented Defendants from preventing or interfering with Plaintiffs' February 14, 2003 temporary art installation. The preliminary injunction has since expired on its own terms. Consequently, in evaluating the prayer for injunctive and declaratory relief in Plaintiffs' Motion for Summary Judgment, the Court will do so based solely on Plaintiffs," facial challenge. fn3

Because the Court has already resolved the case against Coulliette in his individual capacity, the part of Plaintiffs' motion seeking monetary damages against Coulliette will not be addressed.

Standard for a Permanent Injunction

"The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success," Siegel v. Lepore, 234 F.3d 1163, 1213 (11th Cir. 2000)(internal citations omitted). The moving party must demonstrate (1) actual success on the merits; (2) that continuing irreparable injury will be suffered unless the injunction issues-, (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the

opposing party; and (4) that, if issued, the Injunction would not be adverse to the public interest, Siegel v. LePore, 234 F.3d 1163 1176 (11th Cir. 2000); McDonald's Corp, v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998), In addition, plaintiffs must "demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law, Newman v. State of Ala., 683 F.2d 1312, 1319 (11th Cir. 1982). Because Plaintiffs are, unable to show actual success on the merits, the court will not address the other burdens that Plaintiffs' must satisfy in order to be awarded injunctive relief.

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Preventing or Interfering With, Free Speech Activities Within the John D. MacArthur Beach State Park Which Include Innocent, Non-erotic Nudity

Expressive endeavors involving nudity as part of their expression such as the musical Hair have been accorded First Amendment protection. Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546, 550, 557-558 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 923(1975). That said, Supreme Court case law makes clear that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491. U S, 781, 791 (1989); Clark v Community for Creative Non-

violence, 468 U.S. 288, 293 (1984); Heffron v. International Society of Krishna Consciousness, Inc., 452 U.S 640, 648 (1981). Because Defendants and anyone acting in concert with Defendants are constitutionally allowed to prevent or interfere with free speech activities of any type in the Park so long as the above test is met, the Court cannot enjoin Defendants completely from interfering with free speech activities that include nudity. The Court denies Plaintiffs' request that it promulgate such an injunction. For the same reasons, the Court is unable to grant declaratory relief consistent with said proposed injunction.

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Seeking to Enforce Florida Administrative Code 62D-2.014(7)(b) as a Reasonable Manner Restriction to Free Speech Activities Within the Park

In U.S. v. O'Brien, 391 U.S. 367 (1969), the Supreme Court upheld a statute criminalizing the mutilation, destruction or burning of selective service certificates or draft cards. In that case, Mr. O'Brien was charged with violation of said statute after burning his draft card on the steps of (the South Boston Courthouse in an attempt to publicly "influence others to adopt his antiwar beliefs." U.S. v. O'Brien, 391 U.S. 367, 370 (1968). In O'Brien, the Supreme Court reiterated its position that when speech and nonspeech elements are "combined in the same course of conduct, a sufficiently important governmental interest in regulating non-speech element can justify incidental limitations on First Amendment freedoms." Id. at 377. The Court then

held the statute constitutional under the subsequently named O'Brien test because: (1) it was within the constitutional power of the government; (2) it furthered an important or substantial governmental interest; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first Amendment freedoms was no greater than essential to the furtherance of that interest. Id. at 377-378. The O'Brien test has been applied in many situations by the Supreme Court. Twice, it has been applied to upholds bans on public nudity because "Being 'in a state of nudity' is not an inherently expressive condition." City of Erie v. Pap's, 529 U,S. 277, 289 (2000).

In Barnes v. Glen Theatre Inc., (501 US. 560 (1991) and in City of Erie v. Paps, U.S. 277(2000)' the Supreme Court upheld statutes banning public nudity. In both cases, the nudity in issue was erotic nude dancing in private dancing establishments, in Barnes, Chief Justice Rehnquist, joined by Justice O'Connor and Justice Kennedy agreed that nude erotic dancing was expressive conduct within the outer perimeters of the First Amendment. Barnes, 501 U.S. at 566. In their plurality opinion, they applied the O'Brien test and determined that the statute was justified in spite of its incidental limitations on some expressive activity, including nude dancing. Id. at 566-572. They found that the law furthered a substantial governmental interest in protecting societal order and morality. Id. Justice Scalia, in a concurring opinion, concluded the law was constitutional because as a general law regulating conduct and not specifically directed at expression, it should be evaluated under rational basis scrutiny. Id. at 572. Under such minimal scrutiny, he found that moral

opposition to nudity was a rational basis for its ban. Id at 580. In another concurring opinion, Justice Souter found that the statute passed the O'Brien test because of the State's interest in preventing the secondary effects of adult entertainment establishments including such nefarious activity as prostitution, sexual assault and associated crimes. Id. at 581-587. Because the Court did not gather a majority, no definitive rule was established to provide guidance for local legislators and lower court judges with regard to the issue of public nudity statutes.

In 2000, the Supreme Court was again squarely presented with a statute banning public nudity. In City of Erie, the operator of Kandyland, an establishment featuring nude, erotic dancing, challenged a public indecency statute Proscribing nudity in public places. City of Erie v. Pap's A.M., 259 US, 277 (2000). The statute was virtually identical to that in Barnes. Id. at 289. Moreover, its preamble suggested that its actual purpose was to combat the, negative secondary effects associated with erotic dancing. Id. at 292. Once again, in City of Eric, the Supreme Court was unable to gather a majority, although it did come closer. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, concluded that the government restrictions on public nudity should be evaluated under O'Brien because the justification for the rule was unrelated to the "suppression of expression," making it content neutral, Id. at 292. Under O'Brien, the plurality held, just as Justice Souter had in Barnes, that the governmental interest in combating the harmful secondary effects associated with nude dancing were sufficient to tender the statute constitutional as applied. The Justices further asserted that even though requiring dancers "to wear pasties and G-strings may

not greatly reduce these secondary such effects," Id. at 301.

Justice Scalia, with whom Justice Thomas joined, wrote an opinion concurring in the judgment. He maintained that the Supreme Court could not sustain a constitutional challenge because the case was moot, Id. at 302. He did, however, address the merits briefly. He reiterated that the statute should be upheld "not because it survives some lower level of First Amendment scrutiny, but because as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." Id. at 307-308(internal citations omitted). Justice Scalia also made clear that even if the statute was not a general ban on nudity, but specifically targeted nude dancing, he would not find it problematic so long as the conduct was not prohibited precisely because of its communicative attributes. Id. at 310. He wrote, it is the "traditional power of government to foster good morals (bonos mores) and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing itself is immoral, have not been repealed by the First Amendment," Id. at 311.
Because the Supreme Court did not garner a majority in either Barnes or City of Erie, lower Courts such as this one are left to puzzle through cases regarding bans on public, nudity, unsure specifically how to address them. This Court is inclined to agree with Scalia that a general law regulating conduct should sustain unconstitutional challenge not if it survives O'Brien scrutiny, but if a rational basis can be articulated for its existence. Rule 62D-2.014(7)(b), by its terms regulates conduct alone. fn4 It bans all activities involving nudity in "every area of a park including bathing areas,

"regardless o whether that nudity is accompanied by expressive activity, FLA. Admin. Code ANN. r. 62D-2.014(7)(b). There is no indication or allegation by either party that the rule on its face is specifically directed at expression, Maintenance of Florida parks and protection of the experience of the visiting public is a rational basis for a general ban on nudity in parks. Moreover, the traditional police power of the States is defined as "the authority to provide for the public health, safety, and morals of its citizens. Barnes, 501 U.S. 560, 569 (191)(Scalia, concurring). Whether or not this Court agrees with such views,fn5 our society has traditionally treated as morally suspect any activities Involving either erotic or nonerotic nudity. Id. at 575. Governments have thus regulated such behaviors under their police powers. In spite of the Court's distrust of such morality based regulations, they certainly amount to a rational basis for a general ban on nudity ill state parks. Evaluated under Justice Scalia's analysis of general bans on nudity, the Court would find against Plaintiffs.

Justice Scalia's analysis was not the majority or even plurality opinion in either Barnes or City of Erie. Moreover, in Fly Fish. Inc. v. City of Cocoa Beach, 337 F. 3d 1301 (11th Cir. 2003), the Eleventh Circuit applied an intermediate level of First Amendment scrutiny in analyzing the constitutionality of a city's adult entertainment ordinance. The Court will thus proceed to analyze Rule 62D-2.014(7)(b) using the O'Brien test as utilized in City of Erie.

As discussed previously, Rule 62D-2.014(7)(b), by its terms regulates conduct alone. Even though this regulation has an incidental effect on some speakers or

messages, such as those delivered by Plaintiffs, it is content neutral because it can be justified without reference to the content of the expression. City of Erie, 529 U.S. at 294 (2000). Because the Court finds that the DEP "'has a significant interest in keeping the entire park open to all visitors during operating hours," and that nudity would so prevent, we find Rule 62D-2-014(7)(b) to be content neutral on its face,fn6 (Pls.'s Exh. 4).

Because the Rule is content neutral, "only the `less stringent' standard from O'Brien for evaluating restrictions on symbolic speech is employed," City of Erie, 529 U.S. at 289 (2000). The O'Brien test requires that the regulation (1) be within the government's constitutional power to enact; (2) further a substantial or important government interest; (3) be unrelated to the suppression of free expression; and (4) be no greater than is essential to further the government interest. Id. First, it is clearly within the state's police powers to protect "the safety or recreational experience of the visiting public" and "'the natural or cultural value of the park." FLA. ADMIN. CODE ANN. r. 62D-2.014(1). Second, the regulation furthers the important and substantial government interest stated, above. It prevents the preemption of clothed bathers, from, using, the park, protects the public from the "offense" of nudity, and preserves park aesthetics so that the "entire park is open to all visitors during operating hours." (Pls. Exh. 4), As discussed above, the regulation is content neutral and thus satisfies the third prong of the O'Brien test.

Finally, the Court finds that Rule 62D-2.014(7)(b)'s ban on nudity is no greater than is essential to further the

government interest, described above.fn7 In the past, Defendants allowed for nudity coupled with expressive conduct in the Park provided the participants stayed behind a screen separating them from other park visitors. Park authorities were, however, unable to ensure that those engaged in the expressive conduct stayed behind the screen. Defendants thus argue that a complete ban on nudity is necessary, The Court agrees. Moreover, just as Justice O'Connor wrote so eloquently about pasties in City of Erie, even if the public nudity ban has some minimal effect on the message of any expressive conduct "by muting that portion of the expression that occurs when the last stitch is dropped,'" those engaged in expressive conduct at the park are free to continue with their conduct wearing thong bathing suits. City of Erie, 259 U.S. at 294 (2000). "Any effect on the overall. expression is de minimis." Id. The Court finds that Rule 62D-.014(7)(b) prohibiting nudity is no greater than is essential to shield people from the offense of nudity and to protect the experiences of the visiting public. Because Rule 62D-2.014(7)(b) passes the O'Brien test, Plaintiffs' facial challenge cannot prevail. The Court denies Plaintiffs' request that it enjoin the Rule's use. It also denies Plaintiffs' request for declaratory relief regarding the use of Rule 62 D-2.014(7)(b),

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Seeking to Utilize Florida Administrative Code 62D-2-014(18) to Promulgate Ad Hoc Time, Place or Manner Restrictions Without a Narrowly Tailored Set of Standards or Guidelines

The Court now turns to the facial constitutionality of

Rule 62D-2.014(18) and finds it not to be an unconstitutional restriction on free speech. First, the rule does not operate as a prior restraint on speech. "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs, U.S. v. Frandsen, 212 E 3d 1231, 1238-39 (11th Cir. 2000). Under the Park's rule, a park visitor need not obtain a permit or license prior to engaging in expressive activity. The Rule therefore does not operate as a prior restraint.

As stated previously, even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information, Ward, 491 U.S. at 791 (1989), The Court now evaluates Rule 62D-2.014(18) under the Ward standard.

First, the rule is content neutral if the government has not adopted it in order to prevent speech due to disagreement with the message that speech conveys. In this case, the Rule is permissive and operates to allow persons engaging in free speech activities to determine what time, place, and manner restrictions may apply in any particular situation by contacting the park manager. FLA, ADMN. Code ANN. r. 62D-2.014(18). It operates primarily to prevent free speech activities from creating a safety hazard or interfering with any other park visitor's enjoyment of the park's natural or cultural experience." FLA. ADMIN, CODE ANN. r. 62D-2.014(18) Because Rule 62D-2.014(18) is concerned not with the content of the free speech activity

involved, but rather with the operation of the parks, it is content neutral, Moreover, the Court finds the government's interest in running the parks and protecting the safety and enjoyment of the park's visitors to be a significant government interest. See Clark v. Community ,for Creative Non- Violence, 468 U.S. 288, 296 (1984). A content-neutral time, place, and manner restriction that serves a legitimate government interest need not be the least restrictive available. Ward, 491 U.S. at 798-99 (1985). The Court interprets the Rule's language to be limited to applying time, place, and manner restrictions to free speech activities that "create a safety hazard or interfere with. any other park visitor's enjoyment of the park's natural or cultural experience." FLA. ADMIN. CODE- ANN. r. 62D-2.014(i), See Frandsen v Department of Environmental Protection, 829 So. 2d 267, 271 (Fla. 1st DCA 2002), It is thus narrowly tailored, and leaves open ample alternatives for communication. Plaintiffs argue that the regulation gives park managers unfettered discretion in setting restrictions on protected First Amendment activities, and thus is unconstitutional. In Thomas v. Chicago Park District, 534 U.S. 316 (2002), the Supreme Court held a content-neutral permit scheme to be permissible where denial of a permit could be based only upon specific and pre-determined reasons. In that case, Scalia cautioned "Of course even content-neutral time, place, and manner restriction can be applied in such a manner as to stifle free expression. Where, the licensing, official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." Id. at 323. Plaintiffs argue that such a risk is present here. Because the DEP rule in issue here is inapposite,

Plaintiffs are incorrect. Rule 62D2.014, unlike the regulation in Thomas, does not establish a permit system requiring narrow and specific standards. Rather, it is a permissive rule that operates as a warning that time, place, and manner restrictions may apply to free speech. The park manager has discretion to determine the suitability of place and manner, but he does not have discretion to prevent free speech activities. The Court therefore denies Plaintiffs' request to enjoin the use of Rule 62D-2.014(l8) and declines to grant declaratory relief regarding said rule.

This Motion for Summary Judgment has involved purely legal questions based on complete evidentiary records. Both parties have had an adequate opportunity to develop their arguments and adequate notice that the Court will rule in a dispositive manner. Under the Eleventh Circuit's ruling in Artistic Entertainment, Inc. v. City of Warner Robins, 331 F. 3d 1196 (11th Cir. 2003), it is therefore appropriate for the Court to grant summary judgment to Defendants on Count I of the Complaint as against them in their official capacities.

Plaintiffs were not successful in this case at the summary judgment stage. They were, however, successful at the preliminary injunction stage. Plaintiffs were therefore able to obtain the primary relief sought in their complaint, a preliminary injunction prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation on February 13, 2003.

Holmes said "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result

with all your heart you naturally express your wishes in law and sweep away all opposition." Abrams v. U.S., 250 U.S. 616, 630 (1919)(Holmes dissenting). The Court is wary of the oppressive actions which result due to the truth of Homes' words. The Court does not, however, find such oppression to be present in this case. Rule 62D-2.014(7)(b) and Rule 62D-2.014(18) are facially constitutional. It is the Court's cautionary hope that Plaintiffs and Defendants will strive to work together amicably in the future and that Plaintiffs will continue to utilize John D. MacArthur Park, albeit not in the nude.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Final Judgment (DE 45) is, GRANTED IN PART in so much as It applies to Count I as brought against Defendant Coulliette in his individual capacity, Plaintiffs' Motion for Summary Judgment (DE 55) is DENIED. DEFENDANTS are GRANTED Summary Judgment on Count I as brought against Defendant Scruhs and Defendant Coulliette in their official capacities, thus disposing of all remaining claims.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 28 day of January, 2004

Footnotes

Fn1 See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 ((1991)(Chief Justice Rehnquist for the Plurality). ("The traditional police power of the States is defined as the authority to provide for the public health safety, and

morals.

fn2As the Court made clear at the hearing on January 21, 2004, the driving force behind its decision was the testimony of Chief of Operations for the Florida Park Service, Peter Scalco that one of the factors used in determining whether or not to apply Rule 62D-2.014(7)(b) to Ms. Wyner's activity was that it was different from her other activities because it seemed "to be about a peace demonstration. " (Prelim. Injunc. Hearing at 61). From Mr. Scalco's testimony, the Court perceived the DEP to be applying the rules in a content-based and therefore unconstitutional manner,

fn3Plaintiffs argued before the Court on January 21, 2003, that their challenge is an as applied challenge because they are "questioning its application to expressive activity." (Calendar Call Transcript. at p.4). In the absence of any particular facts to which the regulations can be applied, however, the Court must treat Plaintiffs constitutional challenge as a facial one.

fn4As Judge Easterbrook sarcastically articulated in Miller v. Civil City of South Bend, 904 F. 2d 1081, 1120 (7th Cir. 1990), "Almost the entire domain of [the] statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech."
fn5As this Court has previously expressed, "The value of freedom is found not only in the larger issues of life but also in the fanciful and strange. Events like Fantasy Fest in Key West and the Mango Strut in Miami may not be to everyone's taste, but they add to the spice of life in South Florida that for the most part, we enjoy." Wyner v. Struhs, 254 F.Supp.2d 1297, 1303 (S.D. Fla. 2003).

fn6Justice Scalia succinctly described a content-neutral regulation of nudity in the following way: "One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one may go nude in private, again whether or not that nudity is expressive." Barnes v. Glen Theatre, Inc, 501 US. 560, 575 fn3 (1991)(concurring).

fn7In Ward v, Rock Against Racism the Supreme Court held that "Least any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." Ward, 491 U.S. 791, 799 (1999). Although the Ward standard is different than that articulated in O'Brien, because the Supreme Court has applied them in very similar ways, it is instructive. As Professor Heidi Kitrosser states, "the Court effectively has collapsed them into one standard. The Court has done so, first, by explicitly stating that the two standards effectively are the same. Second, the Court has applied each came in a manner that ignores significant facial differences between the two standards. For example, while the O'Brien standard, on its face, makes the very strict demand that a content-neutral regulation be the least restrictive means of furthering the government's interest, the court has not applied the O'Brien test in nearly so strict a manner." From Marshall Mcluhan to Anthropomorphic Cows: Communicative Manner and Me First Amendment, 96 NWULR 1339,1371 (Summer 2002).

7/17/2006

No. 04-14750

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

Versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

On appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

JUDGES: Before EDMONDSON, Chief Judge, BARKETT, Circuit Judge, and HUNT, * District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, FRAP), the Petition(s) for Rehearing EN Banc are DENIED.

Footnote

* Honorable Willis B. Hunt, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

(11)

06-531

Supreme Court, U.S.
FILED
NOV 16 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID B. STRUHS AND TERENCE COULLITTE,

Petitioners,

—v.—

T.A. WYNER AND GEORGE SIMON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Respondent T.A. Wyner's long history of engaging in expressive conduct within the John D. MacArthur Beach State Park is fully set forth in the trial court's preliminary injunction opinion. *See Wyner v. Struhs*, 254 F.Supp.2d 1297 (S.D. Fla. 2003)(Pet.App.9a-22a). By placing events in context, including the pre-existing relationship between the parties and the nature of Wyner's expressive activities within the park, the district court's opinion provides a more comprehensive description of the underlying litigation than the petition for *certiorari*.

For present purposes, a few facts bear particular emphasis. This case began when Petitioners denied Respondents' request for permission to create a temporary art installation composed of nude bodies in the form of a peace sign as part of an anti-war demonstration scheduled to take place in MacArthur Beach State Park on February 14, 2003. Respondents therefore sought immediate injunctive relief from the district court permitting the demonstration to go forward as planned. That request was granted in full. Although labeled a preliminary injunction, the district court's order provided Respondents with *all* the immediate relief they were seeking. Specifically, it allowed Respondents to proceed with the demonstration that Petitioners had attempted to prevent on the date that Respondents had initially chosen. Respondents also sought a permanent injunction prohibiting Petitioners from interfering with future expressive activities and damages for the denial of their First Amendment rights. Those requests were denied by the district court in a subsequent summary judgment order that Respondents chose not to appeal. (Pet.App. 23a-48a).

At the conclusion of the case, the district court awarded attorneys' fees solely for the time that Respondents had spent on the preliminary injunction, Order dated August 16, 2004 (App. 1a-13a), and the court of appeals affirmed. (Pet. App. 1a-8a). In doing so, both lower courts recognized that the preliminary injunction provided Respondents with final and complete relief on the actual dispute that gave rise to this litigation. As the Eleventh Circuit noted in rejecting as moot Petitioners' effort to appeal the preliminary injunction, "the injunction was about a finite event that occurred and ended on a specific, past date." *Wyner v. Struhs*, 179 Fed. Appx. at 566 n.1 (citing *Johnson v. Fla. High School Activities Assoc., Inc.*, 102 F.3d 1172 (11th Cir. 1997))(Pet. App. 5a-6a). Accordingly, the Eleventh Circuit ruled, "[Respondents] are entitled to prevailing party status and attorney's fees because the court granted the preliminary injunction on the merits and [Respondents] obtained the primary relief they sought. The district court properly limited the fee award to the degree of [Respondents'] success." *Id.* at 569 (Pet.App. 5a)(citations omitted).

REASONS FOR DENYING THE WRIT

I. The District Court And Eleventh Circuit Correctly Ruled On The Facts Of This Case That Respondents Are Prevailing Parties Under This Court's Controlling Precedents.

It has been thirty years since Congress adopted the Attorneys' Fee Act of 1976, 42 U.S.C. § 1988, and the standards for determining prevailing party status in civil rights litigation have been clearly defined in the intervening three decades. Those well-understood standards are routinely applied by federal courts throughout the country

on a daily basis and were correctly applied by the lower courts in this case. Petitioners' claim that Respondents should not receive any attorneys' fees because they did not achieve any meaningful success in this litigation is both wrong on the facts and misapprehends this Court's rulings. In either event, it does not warrant plenary review by this Court.

A. Respondent Achieved Significant Success On A Critical Issue In This Case.

Respondent Wyner sought permission from Petitioners to create a peace symbol composed of nude human bodies in a public park as part of a protest against the Iraq war. Permission was denied. (Pet.App. 10a). Because a violation of a state park rule is a misdemeanor under state law, Fla. Stat. § 258.007(2), Wyner was left to proceed at her legal peril.[1] Rather than take that risk, Respondents filed suit seeking to prevent Petitioners from "denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." Verified Complaint, para. 10.

Respondents achieved exactly that relief. The district

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[1] Indeed, Ms. Wyner had previously been arrested twice at the park while engaging in peaceful protest and artistic endeavors. *Wyner v. Struhs*, 254 F.Supp.2d at 1299 (Pet.App. 11a). Wyner was thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believe[d] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

court's preliminary injunction order compelled Petitioners to abandon their announced intention to prevent nudity in conjunction with the peace symbol. (Pet.App. 9a). Thus, as the district court explained: "[Respondents] were therefore able to obtain the primary relief sought in their complaint, a preliminary injunction prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation on February 13, 2003." (Pet.App. 45a.). The district court later explained:

> [Petitioners] argue that [Respondents] are not prevailing parties because they did not ultimately prevail on a legal issue. [Respondents] did prevail on a legal issue. [Respondents] brought both facial and as applied challenges to the park restrictions. The Court ruled in [Respondents'] favor on their prayer "for injunctive relief prohibiting [Petitioners] from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." The Court's Order granting [Respondents'] motion prevented [Petitioners] from preventing or interfering with [Respondents'] February 14, 2003 temporary art installation. The preliminary injunction expired on its own terms.

Order dated August 16, 2004 (App. 3a-4a)(citation omitted).

Having achieved the primary purpose for filing this litigation through court order entered after consideration of

the merits,[2] under this Court's controlling precedents, Respondents were prevailing parties entitled to an award of fees to the extent of their success.

B. The District Court's Order Materially Changed The Legal Relationship Between The Parties.

The standard for "prevailing party" under 42 U.S.C. § 1988 is well established:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. ... Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. ... The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)], not to the availability of a fee award *vel non*.

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[2] "As an initial matter, we accept that the preliminary injunction in this case decided a substantive issue – whether or not the state officials could arrest the nude peace symbol participants – and thus was on the merits." *Wyner v. Struhs*, 179 Fed. Appx. at 568 (Pet.App. 2a-3a).

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 791-3 (1989)(citations omitted). *See also Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992)("In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.").

This "change in legal relationship" standard for determination of prevailing party status has been in use by lower courts for years, and those courts – including the Eleventh Circuit – have consistently analyzed preliminary injunctions to determine whether the injunction merely preserved the *status quo* (thereby only scoring a "procedural" victory) or gave the plaintiff a benefit sought in the litigation. *Compare Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 429 (11th Cir. 1990)(preliminary injunction sufficient to confer prevailing party status because plaintiffs secured relief they had sought: "In determining whether a plaintiff is a 'prevailing party,' it is necessary to evaluate the facts of each particular case."), with *Markham v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 901 F.2d 1022 (11th Cir. 1990)(preliminary injunction insufficient to confer prevailing party status because injunction did not change the legal relationship between the parties but rather preserved the *status quo*).[3] *See also:*

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[3] Petitioners' reference to *University of Texas v. Camenisch*, 451 U.S. 390 (1981), is misplaced. In *Camenisch*, a deaf student had been granted a preliminary injunction, conditioned on the payment of a bond, requiring the University to provide an interpreter. By the time the court of appeals affirmed the granting of the preliminary injunction, the student had graduated, thereby mooting the issue of whether the preliminary injunction should stand. The only issue remaining on remand was the question of who should pay for the interpreter – the

(footnote continued ...)

Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1558 (11th Cir. 1987)(grant of a preliminary injunction on the merits, as opposed to temporary relief maintaining the *status quo*, entitles one to prevailing party status); *Select Milk Producers, Inc. v. Veneman*, 304 F.Supp.2d 45 (D. D.C. 2004)(prevailing party status where preliminary injunction created "material alteration in the legal relationship between the parties"), *aff'd in part, rev'd in part on other grounds and remanded*, 400 F.3d 939 (D.C. Cir. 2005); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160-61 (9th Cir. 2000)(temporary restraining order, which prohibited public officials from interfering with exhibition containing non-obscene erotic art, was sufficient to confer prevailing party status because the injunction did more than preserve the *status quo*, it "allowed the convention and art exhibit to take place"); *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 6 F.Supp.2d 1359 (N.D. Ga. 1998)(change in legal relationship between parties sufficient to make plaintiff prevailing party). *See also*: *Select Milk Producers, Inc., v. Johanns*, 400 F.3d at 943 ("Milk Producers received irreversible relief by virtue of the preliminary injunction" and hence were prevailing parties); *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 966 (D.C. Cir. 2004)(prevailing party where preliminary injunction brought "a change in someone's primary conduct in the real world ... [such as by the] imposition of a restriction on others.")(citation omitted); *Thomas v. National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003)(not prevailing

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(... footnote continued)
school or the student. Prevailing party status was not an issue. Moreover, Petitioners here did not seek a stay or immediate review of the preliminary injunction, affirmatively choosing to comply with the district court's order.

party where preliminary injunction merely preserved the *status quo*); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545 (3rd Cir. 2003)(same); *Race v. Toledo-Davila*, 291 F.3d 857 (1st Cir. 2002)(same); *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 601 (1st Cir.1982)(awarding attorney's fees to plaintiffs who obtained injunction pending appeal where the court "made its decision only after careful consideration of the [plaintiffs'] legal claims").

The district court's preliminary injunction in this case brought about a material change in the legal relationship between the parties. Petitioners in the past have, as they did here, threatened to enforce park rules if Respondent Wyner engaged in similar expressive activities, and in fact enforced their threats by arresting her for violating park rules. Thus, but for the injunction, Petitioners here would have arrested Wyner for violating park rules, and prohibited the production of a nude peace symbol. Petitioners were compelled by court order, under pain of contempt, to permit Respondents' display. Hence, Respondents met the prevailing party standard enunciated by this Court. As the Eleventh Circuit correctly understood, "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees," Pet.App. 2a (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)).

C. *Buckhannon* Did Not Change The Rules For Prevailing Party Status That Apply In This Case.

The decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001), cited by Petitioners, does not

change the analysis. In *Buckhannon*, this Court rejected the "catalyst" theory, holding that a judicially sanctioned change in the legal relationship of the parties was necessary for an award of fees.

The preliminary injunction in this case, violation of which would have been sanctionable by contempt, clearly constituted a judicially sanctioned change in the legal relationship of the parties. Nothing in *Buckhannon* undermines the district court's determination, or the Eleventh Circuit's affirmance, that Respondents were prevailing parties as a result.

> Although *Buckhannon* decisively rejected the "catalyst theory," the Court clearly did not adopt a rule that plaintiffs could only be deemed "prevailing parties" for fee-shifting purposes if they obtained a final judgment on the merits of a suit.
>
> * * *
>
> In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the plaintiff a "prevailing party" under a fee-shifting statute ... . Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a "prevailing party" ... .

Select Milk Producers, Inc., v. Johanns, 400 F.3d at 945. *See also Dubuc v. Green Oak Township*, 312 F.3d 736, 753-4

and n. 8 (6th Cir. 2002)(acknowledging *Buckhannon*'s rejection of the catalyst theory, but holding that preliminary injunctions can support prevailing party status where the relief afforded was not merely procedural, only preserving the *status quo*); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002)(distinguishing *Buckhannon* and finding prevailing party status based upon a preliminary injunction), *cert. denied*, 538 U.S. 923 (2003); *Maine School Administrative Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 15-16 (1st Cir. 2003)(acknowledging *Buckhannon*, court found parents to be prevailing parties despite school district's dismissal of action after school's request for injunction to bar student from attending school was denied); *Palmetto Properties v. County of DuPage*, 375 F.3d 542, 547-52 (7th Cir. 2004)(analyzing *Buckhannon* and finding that county's repeal of provision found to be unconstitutional before entry of final judgment resulted in dismissal for mootness did not deprive plaintiff of prevailing party status), *cert. denied*, 543 U.S. 1089 (2005); *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 229 F.Supp.2d 993, 1004 (N.D. Cal. 2002)(despite dismissal of action for mootness following initial injunctive relief, plaintiffs were prevailing parties: "Defendants did not stop logging voluntarily, but as a result of the court-issued TRO and September 3 preliminary injunction. '[A] defendant acting in accordance with a court order cannot be presumed to be acting gratuitously.' Even absent a final written order, defendants could have been held in contempt had they continued logging in contravention of the court order. Thus, plaintiffs' efforts resulted in a court-ordered change in the relationship between the parties, supporting compensation under *Buckhannon*.")(citation omitted), *aff'd*, 103 Fed. Appx. 627 (9th Cir. 2004). *See also P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 854-55 (3rd Cir.)(enforceable

administrative consent decrees satisfy *Buckhannon*), *cert. denied*, __ S.Ct. __, 2006 WL 1880360 (October 2, 2006).

Buckhannon spelled the demise of the catalyst theory, but it did not purport to change the "material alteration of the legal relationship of the parties" standard set forth in *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782. Indeed, *Buckhannon*'s decision relies, in part, upon that test. 532 U.S. at 604. That Respondents unsuccessfully sought additional relief does not diminish the fact that the lawsuit materially changed the legal relationship between the parties and altered Petitioners' announced intent to prevent the display of a peace symbol composed of nude bodies on February 13, 2003. Without the lawsuit, and the resulting injunction entered by the district court following an evidentiary hearing, the state officials would have been free to prevent or interfere with Respondents' plans. The injunction affirmatively prohibited state officials at the park from arresting Ms. Wyner or otherwise interfering with the production of a nude peace symbol, and permitted the protest to proceed without interference. The relief obtained by Respondents, though labeled a "preliminary injunction," was for all practical purposes a "final injunction" because it afforded irreversible relief to Respondents.[4]

Because Respondents obtained the primary relief sought in their complaint and Petitioners' change in conduct was a direct result of a court order, Respondents are prevailing parties for purposes of 42 U.S.C. § 1988 to the

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[4] Notably, Petitioners did not seek an interlocutory appeal or file a motion to vacate the preliminary injunction. Rather, they purposely chose to comply with the terms of the injunction which subsequently expired upon its own terms.

extent of their success, as found by the district court and affirmed by the Eleventh Circuit.

II. There Is No Meaningful Conflict Among The Circuits That Requires Resolution By This Court.

Petitioners can only point to *Smyth v. Rivero*, 282 F.3d 268 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002), in an effort to manufacture a "split" in the Circuits on whether a preliminary injunction, standing alone, is sufficient to confer prevailing party status upon a plaintiff seeking attorney's fees. While the opinion in *Smyth* undeniably contains broad dicta on this subject, its actual holding is considerably narrower given the facts of the case, and, given those facts, is reconcilable with both the decision below and the consensus view of other circuits.

In *Smyth*, the Fourth Circuit denied prevailing party status to plaintiffs who obtained a preliminary injunction in a case otherwise identical to *Buckhannon* – plaintiffs challenged a state regulation, the district court preliminarily enjoined its enforcement, the state repealed the regulation, and the court dismissed the case as moot. *Buckhannon* foreclosed the plaintiffs' claim that they were prevailing parties because their lawsuit was the catalyst for repeal of the regulation, leaving only the argument that the preliminary injunction sufficed to make them a prevailing party.[5] The Fourth Circuit disagreed, noting that the injunction entered by the district court only preserved the *status quo* – permitting the plaintiffs to continue receiving

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[5] A second argument, based upon a claim that a settlement constituted a judicially enforceable consent decree, was also rejected by the court. The *Smyth* opinion devotes considerably greater attention to rejecting this second argument. *Smyth v. Rivero*, 282 F.3d at 278-85. That claim and the court's holding are not relevant here.

benefits pending the outcome of the litigation, and rested heavily on the balance of equities rather than an assessment of the merits of the litigation.

By contrast, Wyner sued to secure the right to produce a peace symbol composed of live human bodies to protest against the war in Iraq. The district court entered a preliminary injunction that altered the *status quo*, permitting the Respondent to go forward with her plan, and did so after a thorough exegesis of controlling First Amendment doctrine.[6] In short, the *Smyth* injunction merely maintained the *status quo ante* pending a full inquiry into the merits that

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[6] In an effort to bolster *Smyth*'s concern for the often hasty nature of emergency relief, Petitioners implicitly suggest (pp. 4, 15-6) that they were disadvantaged by the preliminary injunction hearing. Petitioners raised this concern for the first time on appeal to the Eleventh Circuit, arguing that they were deprived of notice and an opportunity to oppose Respondents' claims at the preliminary injunction hearing. The record reflects otherwise.

Petitioners were represented by three attorneys at the preliminary injunction hearing. Petitioners submitted both a memorandum of law in opposition to the motion for preliminary injunction and copies of cases to the district court for consideration prior to the hearing and the issuance of the injunction. Petitioners' counsel asserted that the facts were not disputed and that there was only a legal question as to whether Wyner could produce a peace symbol composed of nude human bodies. Upon hearing Respondents' counsel's summary of what Ms. Wyner would testify to, Petitioners' counsel chose not to dispute the facts.

Petitioners' counsel made no objection to going forward at the time of the hearing; made no objection to appearing by telephone; raised no objection following the hearing; and claimed no prejudice at any time to the district court. Petitioners fully participated in the evidentiary hearing, presented their own witness, did not contest the facts, and took no steps to appeal or otherwise contest the entry of the preliminary injunction until an award of attorney's fees became evident.

never took place, while the injunction in this case forever altered the legal relationship of the parties by compelling Petitioners to permit Respondent to display the peace symbol based upon an analysis of the merits of her claim.

Based upon the facts before that court, the preliminary injunction in *Smyth* did not change the legal relationship between the parties and served only to preserve the *status quo*. Based upon the fact specific context of this case, both the district court and the Eleventh Circuit correctly applied this Court's controlling precedents. Given these substantial factual differences, there is no meaningful conflict among the circuits that requires resolution by this Court. Nor does the petition for *certiorari* in this case articulate a discernable purpose to resolve significant legal issues beyond the private interests of the petitioners.

CONCLUSION

For the reasons stated herein, the petition for writ of *certiorari* should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80103-CIV-MIDDLEBROOKS

T.A. WYNER and
GEORGE T. SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and
TERRENCE COULLIETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.
_____/

OMNIBUS ORDER

THIS CAUSE comes before the Court upon Defendant Terrence Coulliette and David Struhs' Motion to Alter or Amend the Judgment (DE 85), filed February 11, 2004; Plaintiffs' Application for Award of Attorney's Fees and Reimbursement of Litigation Expenses (DE 89), filed February 27, 2004; and the Motion to Tax Costs (DE 88), filed by Defendants on February 27, 2004. The Court has

reviewed the record and is otherwise fully advised in the premises.

Introduction

The above-styled cause arose out of a dispute between the Defendants, representatives of the Florida Department of Environmental Protection ("DEP"), and Plaintiffs, private citizens, over the constitutionality of two Florida Administrative Code Rules ("FAC"), the "Free Speech Activities Rule" and the "Bathing Suit Rule." On February 12, 2003, Plaintiffs filed the Complaint (DE 1) and Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction (DE 4) seeking Court intervention to prevent state park officials from interfering with a protest consisting, *inter alia,* of the formation of a temporary art installation comprised of nude bodies in the form of a peace sign, scheduled to take place on February 14, 2003. On February 13, 2003, this Court issued an Order (DE 8)[1] prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation. Defendants' Motion for Summary Final Judgment (DE 45) was filed November 17, 2003 and Plaintiffs' Motion for Summary Judgment (DE 55) was filed December 8, 2003. On January 8, 2004, the Court issued an Order on Motions for Summary Judgment (DE 83) granting Summary Judgment in Defendants' favor. The Court entered Final Judgment (DE 84) in favor of Defendants and against Plaintiffs upon the Complaint and retained jurisdiction for the purpose of awarding costs and fees, including those

[1] A Corrected Order Granting Motion for Temporary Restraining Order or Preliminary Injunction (DE 11) was subsequently issued on February 27, 2003.

expended on the Motion for Preliminary Injunction upon which Plaintiffs prevailed.

Defendants now move to alter the final judgment to correct the finding that Plaintiffs are prevailing parties. Plaintiffs move for fees and costs. Defendants move for costs.

Alteration of the Judgment

On the merits, this Court finds no good cause to alter or amend its prior ruling. A motion to alter or amend a judgment must indicate why the court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Wendy's Int'l, Inc., v. Nu-Cape Construction, Inc.*, 169 F.R.D. 680, 684 (M.D. Fl. 1996). There are generally three grounds upon which reconsideration of an order is appropriate: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct error or manifest injustice. *See id.; Sussman v. Salem, Saxon & Neilson, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). None of these standards has been met. Plaintiffs did not prevail on every claim asserted in the litigation. They did, however, achieve one of the primary purposes for filing this litigation, prevention of the Defendants from interfering with the temporary art installation planned for February 14, 2003.

Defendants argue that Plaintiffs are not prevailing parties because they did not ultimately prevail on a legal issue. Plaintiffs did prevail on a legal issue. Plaintiffs brought both facial and as applied challenges to the park restrictions. The Court

ruled in Plaintiffs favor on their prayer "for injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." (Pls. Compl. ¶ (43)(a)). The Court's Order granting Plaintiffs' motion prevented Defendants from preventing or interfering with Plaintiffs' February 14, 2003 temporary art installation. The preliminary injunction expired on its own terms. Consequently, after prevailing on their legal challenge to Defendants' application of the regulation to the February 14, 2003, temporary art installation,[2] Plaintiffs were unsuccessful on their facial challenge of the regulations. The Court did not and was unable to revisit Plaintiffs' as applied challenge.[3] Accordingly, unlike in the cases cited by Defendants, the Court did not revisit and reverse its earlier decision regarding the same legal issue. The Court does not find good cause to alter or amend its prior judgment.

Attorneys' Fees

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[2] As the Court made clear at the hearing on January 21, 2004, the driving force behind its decision was the testimony of Chief of Operations for the Florida Park Service, Peter Scalco that one of the factors used in determining whether or not to apply Rule 62D-2.014(7)(b) to Ms. Wyner's activity was that it was different from her other activities because it seemed "to be about a peace demonstration." (Prelim. Injunc. Hearing at 61). From Mr. Scalco's testimony, the Court perceived the DEP to be applying the rules in a content-based and therefore unconstitutional manner.

[3] In the absence of any particular facts to which the regulations could be applied, at the summary judgment stage, the Court was able to treat Plaintiffs' constitutional challenge only as a facial one.

Pursuant to 42 U.S.C. Section 1988, Plaintiffs move for an award of attorney's fees and litigation expenses through the preliminary injunction and February 14, 2003 protest, and then from February 13-25, 2004. 42 U.S.C. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Defendants respond that as discussed in their Motion to Alter or Amend Judgment, Plaintiffs are not entitled to an award of attorneys' fees. The Court has already found that Plaintiffs were prevailing parties at the preliminary injunction stage and retained jurisdiction to award fees and costs to Plaintiffs for expenses associated with that stage of the litigation. It is thus unpersuaded by said argument.

The starting point in any "reasonable fee" determination is the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The resulting point is known as the "lodestar." *Id.* The lodestar may thereafter be enhanced or reduced based on the results obtained or the risk of non-payment. *Pennsylvania v. Delaware Valley Citizens Council II,* ("Delaware II") 483 U.S. 711, 745 (1987); *Pennsylvania v. Delaware Valley Citizens Council I,* ("Delaware I") 478 U.S. 546 (1986). Where the objective sought was in fact obtained, the full lodestar amount should be awarded. *Norman v. Housing Authority of City of Montgomery,*

836 F.2d 1292 (11th Cir. 1988). "If the result was excellent, then the court should compensate for all hours reasonably expended." *Id.* at 1302 (citing *Popham v. Kennesaw*, 820 F.2d 1570, 1578 (11th Cir. 1987)).

In considering whether to adjust the lodestar amount upward or downward, a court may wish to consider any of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974);[4] *Hensley*, 461 U.S. at 436. However, enhancement of the lodestar should only be made in exceptional cases where need and justification for such enhancement are readily apparent and supported by clear evidence of record. *Delaware II*, 483 U.S. at 728. *See also Norman*, 836 F.2d at 1302. The Supreme Court has rejected enhancements for calculated lodestar amounts in cases which involve federal fee-shifting statutes such as the one involved herein. *See City of Burlington v. Dague*, 505 U.S. 557 (1992). A downward adjustment of the lodestar may be required when the party being awarded fees achieved only limited success or spent time on unsuccessful and unrelated claims. *Hensley*, 461 U.S. at 436. A further downward adjustment may be required for

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[4] The 12 factors enumerated in *Johnson* are as follows: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

"excessive, redundant, or otherwise unnecessary" hours. *Id.* at 434.

Plaintiffs seek $28,505.00 in fees for 82.3 hours of work performed by James K. Green and Randall C. Marshall at a rate of $350.00 per hour. Defendants make several arguments in opposition to Plaintiffs request. First, they argue that it is difficult to determine an appropriate award based on a fair proportion of the time spent on the preliminary injunction stage of the case as compared to the time spent on the entire case because Plaintiffs have only submitted the time records related to their work on the preliminary injunction. This argument is nonsensical. Plaintiffs do not seek nor are they entitled to fees for time spent on other aspects of the case. Accordingly, the Court has no desire to view the time records for the entire case.

Defendants argue that Plaintiffs should not be allowed a rate appropriate for specialists and also be allowed to bill for time spent researching the topic of their specialty. Defendants likewise take issue with time billed for (1) activities they assert a paralegal could have done and (2) activities related to the case in general. Defendants additionally contend that Plaintiffs' fee award should be adjusted downward in light of their limited success in this litigation.

In determining the reasonable hourly rate for the purpose of an attorneys' fees motion, the burden is on the moving party to establish the prevailing market rate, which is the rate charged in the community by lawyers of reasonably comparable skill, experience and reputation for similar services. *Blum v. Stenson,* 465 U.S. 886, 895-96, n. 11 (1984); *NAACP v. City of Evergreen,* 812 F.2d 1332, 1338

(11th Cir. 1987); *Gaines v. Dougherty County Bd. Of Education,* 775 F.2d 1565, 1571 (11th Cir. 1985). "The decision regarding the appropriate hourly rate may be made either by analyzing the affidavits submitted by counsel or, if this documentation is insufficient, by relying upon the court's expertise." *Norman,* 836 F.2d at 1303; *Avirgan v. Hull,* 705 F. Supp. 1544, 1549 (S.D. Fla. 1989).

Satisfactory evidence of the market rate, however, requires more than the mere affidavit of the attorneys performing the work. *Blum,* 465 U.S. at 896. Also insufficient is testimony that a given fee is reasonable; evidence must be of rates actually billed and paid. *Hensley,* 461 U.S. at 439 n. 15. Such evidence may be adduced from charges of lawyers under similar circumstances or by opinion evidence. *Norman,* 836 F.2d at 1299. When analyzing the market rates being attested to, the Court may consider any of the twelve *Johnson* factors referred to previously. *Delaware Valley I,* 478 U.S. at 564-69. One of those factors, the hourly rate normally charged by the applicant's counsel, has been deemed the logical starting place in any rate determination. *Vaughns v. Bd. Of Education,* 598 F.Supp. 1262 (D. Md. 1984), *aff'd* 770 F.2d 1245 (4th Cir. 1985); *Zeffiro v. First Pennsylvania Bank, N.A.,* 574 F.Supp. 443, 447 (E.D. Pa. 1983), *aff'd without opinion,* 746 F.2d 1469 (3d Cir. 1984). *See also Florida Pawnbrokers v. Fort Lauderdale,* 711 F.Supp. 1084, 1086-87 (S.D. Fla. 1989). Also considered probative are the rates billed in similar lawsuits and the relative skill of the attorneys involved. *Norman,* 836 F.2d at 1299.

The hourly rate sought for the attorneys in this matter is $350 per hour. Attorneys Green and

Marshall are constitutional litigators with twenty years of experience. Attorney Green's current billing rate to private clients is $350 per hour. Attorney Marshall is the legal director for the American Civil Liberties Union Foundation of Florida, Inc., and as a full-time staff attorney for that organization, does not bill clients. Attorney Marshall's rates accordingly must be pegged to the prevailing community rates. *Blum v. Stetson,* 465 U.S. 886, 895 (1984).

In filing a petition for fees, the burden is upon plaintiffs to establish the prevailing market rate for their lawyers' services. Plaintiffs do that by offering affidavits and case law supporting their requested rates. Defendants contest the rate and request an evidentiary hearing in order to cross examine David J. Sales, who submitted an affidavit in support of Plaintiffs' request. They, however, offer no evidence to contradict Plaintiffs' requested hourly rates nor suggest what they believe to be an alternate prevailing market rate in the Southern District of Florida. In the instant case, an evidentiary hearing is unnecessary as there are no disputes of fact and the written record is sufficient to enable the trial court to make a determination regarding fees. Based on the Court's expertise regarding hourly rates, the Court will reduce the requested rate for both attorneys from $350 to $315 per hour.

The Court finds no merit to Defendants other objections. Plaintiffs seek fees only to the extent of their success. A downward adjustment based upon the degree of success is accordingly unnecessary. After a review of the time records, the Court finds that Counsel for Plaintiffs exercised appropriate billing judgment.

Costs

Defendants move pursuant to 28 U.S.C. § 1920 and Rule 54(d)(1) of the Federal Rules of Civil Procedure for costs incurred in this action. Plaintiffs respond that (1) because they are the prevailing party, Defendants are not entitled to costs; (2) Defendants' motion is unsupported and not recoverable; and (3) that taxing costs against Plaintiffs would be inequitable.

Although Plaintiffs were the prevailing party with regard to the preliminary injunction, final judgment was entered in favor of Defendants and they are entitled to costs. Under 28 U.S.C. § 1920, reimbursements for only the following costs may be awarded: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1928 of this title.

In their Motion to Tax Costs, Defendants requests [sic] reimbursement as follows:

1.	Copying Costs	$1,518.55
2.	Process Servers	$ 68.00
3.	Deposition Transcripts	$3,603.86
4.	Long Distance Telephone	$ 79.79
5.	Federal Express	$ 70.46
	TOTAL	$5,340.66

Copying taxes will be taxed as costs if Defendants establish that copies were necessarily obtained for use in the litigation and Defendants presents [sic] evidence of such. *Cullens v. Georgia Dept. of Transportation*, 29 F.3d 1489, 1494 (1994). No evidence was presented regarding these copying fees. The fees will therefore be disallowed. The deposition transcripts were "necessarily obtained for use in the case," and are taxable under 28 U.S.C. § 1920(2). *Morrison v. Reichhold Chems, Inc.*, 97 F.3d 460, 465 (11th Cir. 1996). Under *United States E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 624 (11th Cir. 200) [sic], the $68.00 process server fee may be taxed pursuant to 28 U.S.C. § 1920(1). Long distance telephone charges are appropriate under 28 U.S.C. § 1920 to the extent that they are reasonable. *Cullens v. Georgia Dept. of Transportation*, 29 F.3d at 1494. Because, however, the Court cannot determine if the calls were reasonable given the documentation provided by Plaintiff, [sic] $79.79 for long distance telephone calls will not be taxed as costs. Because in *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996), the Eleventh Circuit has held such costs nonrecoverable under 28 U.S.C. § 1920, the Court will disallow Plaintiff's [sic] Federal Express costs. Accordingly, the Court must now decide whether it is equitable to tax $3,671.86 for Defendants costs.

It is within the discretion of the Court to decline to tax all or some of the costs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). In determining whether to tax costs, the Court should consider the equities and public interests at stake. *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469, 472 (E.D.N.Y. 1977). In evaluating the equities of taxing costs, the Court can consider a variety of factors including the financial resources of the parties; whether the case concerns matters of public interest; and any possible deterrent effect on meritorious litigation. *Id.; Muller v. United States*, 811 F.Supp. 328, 329 (N.D. Ohio 1992). The Court finds that an assessment of $3,671.86 in costs in the instant case would be burdensome to Plaintiffs and of little benefit to Defendants. Plaintiffs claim was not frivolous and concerned a matter of public interest. An assessment in whole might also deter future litigants from pursuing first amendment claims.

Plaintiffs seek reimbursement for $687.00 in costs. Defendants offer no objection. The Court finds it equitable to hold Plaintiffs responsible for $687.00 of Defendants costs and Defendants responsible for $687.00 of Plaintiffs costs. Therefore, no judgment will be entered against either party regarding costs.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendant Terrence Coulliette and David Struhs' Motion to Alter or Amend the Judgment (DE 85) is DENIED. Plaintiffs' Application for Award of Attorney's Fees and Reimbursement of Litigation Expenses (DE 89) is GRANTED IN PART. The

Motion to Tax Costs (DE 88) is GRANTED IN PART.

It is FURTHER ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment in favor of the Plaintiffs and as against Defendants for $25,924.50 representing attorneys' fees.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 16th day of August, 2004.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to counsel of record

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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, plaintiffs contend that they are entitled to attorney's fees because they got what they wanted, even though the court never determined that the State officials violated federal law or ordered the State to provide relief at the end of the case. The central justification for attorney's fees under § 1988, however, is that "the civil rights defendant, who is required to pay the attorney's fees, has *violated* federal law." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (emphasis supplied). "Section 1988 simply does not create fee liability where merits liability is non-existent." *Kentucky* v. *Graham*, 473 U.S. 159, 168 (1985). The State treasury should not be required to pay fees when the State has not been held to be a violator of federal law or otherwise ordered to provide relief resolving a plaintiff's legal claim.

Plaintiffs rely on a preliminary injunction temporarily enjoining State officials from enforcing the nudity ban against them. A preliminary injunction, however, is the result of a balancing process that determines how the parties interact *while the court decides a plaintiff's claim.* It neither determines that a defendant has violated federal law nor constitutes a merits determination, and is not a material change in the parties' legal relationship under this Court's jurisprudence. It is irrelevant that plaintiffs were temporarily able to engage in desired conduct; indeed, a party who obtains a *permanent* injunction that is later reversed temporarily engages in desired conduct, but is not a prevailing party. See, *e.g.*, *Pottgen* v. *Mo. State High Sch. Activities Ass'n*, 103 F.3d 720, 723-24 (8th Cir. 1997); *Palmer* v. *City of Chi.*, 806 F.2d 1316, 1320 (7th Cir. 1986). It is also irrelevant that the preliminary injunction was not appealed and could be enforced by contempt. A preliminary injunction alone does not confer prevailing-party status.

In the alternative, plaintiffs did not prevail because, after the district court granted preliminary relief, it rejected its

tentative reasoning and entered final judgment for the State on the merits. Plaintiffs' sole response is a revisionist assertion that the preliminary injunction was based on a content-discrimination claim that was not mentioned in the motion, expressly assumed away in the preliminary injunction, and rejected by the court of appeals. In granting the preliminary injunction, the district court specified that it did so because the State had less restrictive alternatives to its nudity ban. That specification is binding. See Fed. R. Civ.-P. 65(d) (requiring injunction to "set forth the reasons for its issuance" and be "specific in terms"). The court's ultimate reversal of its tentative conclusions on a full record and entry of judgment for the State means that plaintiffs did not prevail.

Finally, plaintiffs claim prevailing-party status even when a preliminary injunction is based on a legal claim that becomes moot before adjudication. This assertion cannot be reconciled with the logic of this Court's decisions, see Pet. Br. 32-34. It is wrong and unfair to treat a plaintiff as a prevailing party based on a preliminary injunction when a claim is mooted before a defendant can fully defend its laws. Indeed, plaintiffs' contrary assertion is irreconcilable with *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 603-04 (2001), which holds that a plaintiff who commences litigation and "gets his way" is not a prevailing party, even when a defendant precipitates mootness. Judicial resolution of the claim is required. *Id.* at 615 (Scalia, J., concurring).

ARGUMENT

I. PLAINTIFFS WHO OBTAIN A PRELIMINARY INJUNCTION AND NOTHING MORE ARE NOT PREVAILING PARTIES.

This Court "ha[s] emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Indep. Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 762

(1989). At the end of this case, the district court found no constitutional violation and entered final judgment for the State officials. Plaintiffs did not prevail.

Plaintiffs erroneously contend that a preliminary injunction is "'relief by the court'" that "'material[ly] alter[s]'" the parties' relationship, making them prevailing parties. Resp. Br. 19 (quoting *Buckhannon*, 532 U.S. at 603-04). But the mere fact of relief or some change in the parties' relationship is insufficient for prevailing-party status. To cause a material change, the judicial relief must result from "a *resolution* of the dispute" in the plaintiff's favor. *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis supplied). A preliminary injunction does not fit the bill because it is a temporary order addressed to the reality that it takes time for the judicial system to resolve a case.

A. Plaintiffs Are Not Prevailing Parties Simply Because A Preliminary Injunction Temporarily Permitted Them To Engage In Desired Conduct.

1. Plaintiffs' principal argument is that they are prevailing parties because the preliminary injunction allowed them to engage in the February 14, 2003 nude peace symbol without state interference. This argument cannot withstand scrutiny. A preliminary injunction temporarily precludes the State from enforcing its laws against a plaintiff, but does so only as a consequence of the time our legal system requires to adjudicate a claim. It neither resolves the underlying claim nor decides its merits; it plainly does not determine that the defendants violated federal law. It means only that in balancing the relevant equitable factors, including a prediction of success on the merits, the court has determined that *while it adjudicates the actual merits*, the status quo should favor the plaintiffs.

The fact that a plaintiff "gets his way" while the wheels of justice turn does not make him a prevailing party. *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). That is

why, as plaintiffs concede (Resp. Br. 24), a party who obtains real-world relief through a temporary restraining order is not a prevailing party. And, that is why even a party who obtains a *permanent* injunction, and thus a period of relief, is not a prevailing party if that injunction is overturned, although in the interim the party engages in desired conduct. See *supra* at 1 (citing cases); *Buckhannon*, 532 U.S. at 603-04.

Plaintiffs try to squeeze the required effect on "substantial rights," *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (per curiam), from the preliminary injunction by claiming that the State cannot arrest plaintiffs for their February 14, 2003 protest. Resp. Br. 21. If this is correct,[1] it is only a byproduct of the court's decision to structure the status quo pending its merits decision to benefit plaintiffs; it does not convert the preliminary decision into relief resolving a legal claim and finding the defendants violators of federal law. In any event, plaintiffs' argument proves too much. Plaintiffs whose preliminary injunctions are reversed on appeal are *not* prevailing parties, see *supra* at 1. Yet the state cannot criminally prosecute such plaintiffs for actions protected by the later-reversed preliminary injunction, Resp. Br. 21 & n.7.

This case illustrates why this Court should not adopt a legal rule authorizing prevailing-party status simply because a

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[1] Although plaintiffs assert that State officials "continue to be prevented from prosecuting respondents for engaging in the protest on February 14, 2003," Resp. Br. 20-21 & n.7 (citing, *inter alia*, *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920)), this is far from settled. This Court has not resolved the question of whether a preliminary injunction barring state officials from enforcing a state law provides complete immunity against liability if that law is later adjudged to be valid. *See Edgar* v. *MITE Corp.*, 457 U.S. 624, 630 (1982) (declining to address the issue, and saying that it was "not ... frivolous ... by any means"). *See id.* at 653 (Stevens, J., concurring in part) ("[t]here simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law").

party obtains benefits as the result of a preliminary injunction. The preliminary injunction issued here resulted from the district court's tentative view that plaintiffs were likely to prevail on their claim that Florida's nudity ban was unconstitutional as applied to their expressive conduct, an error rectified on summary judgment.

Finally, and most importantly, this Court's cases make clear that relief resulting from the "resolution" of a plaintiff's claim in his or her favor is a prerequisite for prevailing-party status. *Tex. State Teachers Ass'n.*, 489 U.S. at 792. A plaintiff obtains such relief only when the court determines that the defendant is liable on a claim and "only in that event has there been a determination of the 'substantial rights of the parties.'" *Hanrahan*, 446 U.S. at 758. A preliminary injunction is provisional, not final. Plaintiffs' attempt to equate a preliminary injunction with "an irreversible partial summary judgment on the merits" (Resp. Br. 21) is, accordingly, wrong. A preliminary injunction is *not* "tantamount to [a] decision[] on the underlying merits," *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981); it simply "preserves" the status quo based on a prediction and other equitable factors. *Id.* Temporary relief based on a preliminary injunction cannot confer prevailing-party status.

2. Because plaintiffs believe that the preliminary injunction made them prevailing parties, they next argue that the State officials' failure to appeal the preliminary injunction should not deprive them of prevailing-party status. The premise is wrong; plaintiffs were never prevailing parties. And, the State officials' (successful) decision to litigate this case to judgment on the merits, instead of appealing the preliminary injunction, does not alter this conclusion.

As plaintiffs state, although a preliminary injunction is neither a final order nor a merits determination, it is immediately appealable under 28 U.S.C. § 1292(a)(1). But, on appellate review of a preliminary injunction, as in the district court, the question is not whether plaintiffs' legal

claims are meritorious. The question is whether the district court abused its discretion in balancing the equitable factors, including the plaintiffs' likelihood of success on the merits. See, *e.g.*, *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). Nor is the fact that an order is interlocutorily appealable relevant to whether it permanently resolves a plaintiff's claim. See U.S. Br. 26-27 (citing examples of interlocutory appeals on non-merits issues).

A preliminary injunction makes no definitive finding about compliance with federal law and resolves no claim; indeed, as occurred here, an enjoined defendant may ultimately be fully vindicated. See, *e.g.*, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4445, at 301 (2d ed. 2002) ("[g]rant or denial of interlocutory injunctions clearly does not foreclose further litigation in the same proceeding, so long as [the] decision rested on mere preliminary estimates of the merits or discretionary remedial grounds").[2] Neither the decision not to appeal nor affirmance of a preliminary injunction on appeal give the injunction preclusive effect on the merits. See *United States* v. *United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-99 (1950); *Camenisch*, 451 U.S. at 395. Whether appealed or not, preliminary injunctions do not confer prevailing-party status.[3]

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[2] Plaintiffs insinuate that preliminary injunctions sometimes have preclusive effect, but in reality, they are eligible for preclusion only "if they rest on grounds that overcome the ordinary limits of procedure and discretion." 18A Wright et al., *supra* § 4445 at 305; *id.* § 4445 at 306 ("[p]reclusion is proper so long as the parties have had a full opportunity to advance *all the evidence and arguments that would be available at a full-scale trial on the merits*") (emphasis supplied).

[3] Plaintiffs claim that the preliminary injunction was "likely" to "have been upheld on appeal." Resp. Br. 24. Such hypothesized outcomes are easy to assert and difficult to prove. This argument, moreover, proves our point. On appeal, the district court's decision would have been reviewed

Plaintiffs' suggestion that a plaintiff who obtains a preliminary injunction is a prevailing party unless the State successfully appeals that injunction would be true only if a preliminary injunction were an order resolving a plaintiff's legal claim, which it most emphatically is not.

Finally, plaintiffs' position belies any assertion that their proposed legal rule would conserve the parties' and the courts' resources. In plaintiffs' view, the State officials were required to engage in emergency appellate litigation – seeking a stay and expedited review of the preliminary injunction under the less rigorous merits inquiry and lower standard for appellate review for such relief – *solely to avoid liability for attorneys' fees*. To protect the treasury, state officials would have to appeal every preliminary injunction, though they might prefer to use those resources to litigate a claim's merits (as the State did here) or to fund other state priorities. That would make no sense. See U.S. Br. 26. ("Congress did not enact the attorney's fee statutes to proliferate the number of highly time-sensitive interlocutory appeals taken by governments for the sole purpose of protecting the public fisc from attorney's fee liability").

3. In a similar vein, plaintiffs argue that preliminary injunctions materially alter the parties' legal relationship because they are enforceable by contempt. Again, the problem with this argument is that the preliminary injunction orders the parties' legal relationship temporarily, and does not resolve a plaintiff's legal claim; it sets the rules for the holding action that occurs *while the court is deciding the merits*. The enforceability of such an order by contempt does not transform it into relief that resolves plaintiffs' legal claims. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 53

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under the abuse of discretion standard, but on a "complete evidentiary record[]," the court found that the ban was no more restrictive than necessary, was content-neutral, and furthered an important government interest. Pet. App. 45a, 35a-36a, 41a.

(1991) (contempt "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation"). A defendant could be held in contempt for violation of an injunction; and if the injunction were reversed on appeal, the plaintiff would not be a prevailing party.

The purpose of the contempt power is to vindicate the authority of the court, not to transform a preliminary prediction into a determination that the defendant was a "violator of federal law," *Martin*, 546 U.S. at 137, as required for prevailing-party status. Like preliminary injunctions, such judicial orders do not "materially alter" the parties' legal relationship in the manner required to make the plaintiff a prevailing party.

B. Preliminary Injunctions Do Not Confer Prevailing-Party Status Because They Neither Determine That Defendants Violated Federal Law Nor Oblige Defendants To Provide Relief That Resolves A Plaintiff's Legal Claim.

1. In arguing that preliminary injunctions are sufficiently merits-based to confer prevailing-party status, plaintiffs first mischaracterize the State officials' argument that a preliminary injunction does not decide a claim's merit as a factual argument that there was insufficient time for the State to fully present its position on the merits at the preliminary-injunction stage or on appeal from the order. In fact, as is often true in cases involving preliminary injunctions, the motion was presented for the court's determination shortly before the event at issue (2 days), and was entered less than 24 hours before the event occurred, making it extremely difficult for the State to seek review.[4] But, although the

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[4] Plaintiffs seek to blame this on the State, noting that Wyner first notified State officials of her planned February 14, 2003 nude peace symbol in mid-January 2003. Resp. Br. 25. The State has strong counter-arguments as the chronology set forth at Pet. Br. 5-6 demonstrates, most notably the

circumstances of this case effectively illustrate why a party who obtains only a preliminary injunction should not be a prevailing party, it is the provisional *nature* of a preliminary injunction (not the circumstances here) that explains why such an order does not confer prevailing-party status.

The questions whether a preliminary injunction should issue and whether a plaintiff prevails on the merits "are significantly different." *Camenisch*, 451 U.S. at 393. In issuing a preliminary injunction, the court makes a prediction about the likelihood of the plaintiff's success on the merits as one element in a multi-factor balancing of interests to determine how to structure the parties' relationship *during the pendency of the merits determination.* For claims akin to the First Amendment claim here, courts place a heavy thumb on the scale favoring a preliminary relief for fear of depriving a party of constitutional rights "for even minimal periods of time." J.A. 95. To obtain attorneys' fees, however, a party must actually prevail, not simply be predicted to prevail, and the defendant must be found to bear legal responsibility for providing relief that resolves a legal claim. Cf. *Camenisch*, 451 U.S. at 394 (admonishing that likelihood of success should not be equated with actual success).

Indeed, in likening preliminary and permanent injunctions, plaintiffs turn a willfully blind eye to the nature of preliminary injunction proceedings generally, and to the nature of the proceedings here. There are both substantive and "significant procedural differences between preliminary and permanent injunctions." *Id.* at 394. "[T]he parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial

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fact that Wyner had asked State park officials to perform nude in 2001, and been informed by attorneys for the State that she could not do so, *id.* at 5. The issue, however, is not who is to blame for the fact that a hasty injunction hearing was required, but rather whether a preliminary injunction confers prevailing-party status.

decision based on the actual merits of the controversy." *Id.* at 396. Time pressures often "deprive[] the defendant of valid defenses," *Hewitt* v. *Hampton*, 482 U.S. 755, 762 (1987), and limit the scope of the parties' evidentiary and legal presentation. *Camenisch*, 451 U.S. at 395.

It is fundamentally unfair to treat a plaintiff as a prevailing party and award attorney's fees based on such proceedings. That is why a preliminary injunction is limited in effect to a non-binding prediction, enforced to prevent irreparable harm while the court adjudicates a claim's merit. That is also why the Federal Rules require a plaintiff seeking an injunction to give security to "'protect[] against a court order granted without the full deliberation a trial offers.'" See Fed. R. Civ. P. 65(c); *Camenisch*, 451 U.S. at 397.

2. Plaintiffs acknowledge that preliminary injunctions sometimes lack *res judicata* effect (that is the general rule), but claim that some *may* have such effect and thus be sufficiently merits-based to confer prevailing-party status. Resp. Br. 28. Plaintiffs do *not* claim that the preliminary injunction here has such effect, nor could they since the underlying claim was not fully or fairly litigated. But even a preliminary injunction with some preclusive effect (*e.g.*, in a subsequent petition for emergency relief) would not confer prevailing-party status unless it provided relief resolving a plaintiff's legal claim in his or her favor.

In rare situations, a reviewing court or the district court may later either convert a preliminary injunction into a permanent injunction or, because the facts are not in dispute, issue a dispositive legal ruling (rather than a prediction) on the actual merits of a claim. See, *e.g.*, *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-757 (issuing controlling decision of law where the district court's injunction decision "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance"), *overruled on other grds. by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1986); see

generally Fed. R. Civ. P. 54(b). In that setting, a preliminary injunction may become a full-fledged judgment on the merits and support a claim to "prevailing party" status. In most cases, including this one, however, the preliminary relief does not resolve any substantive issue of law on the merits.[5]

3. Contrary to plaintiffs' contention, the proceedings here illustrate – both procedurally and substantively – why a preliminary injunction is not sufficiently merits-based to confer prevailing-party status. Plaintiffs claim that the State officials did not object to the timing of the hearing or their inability to develop additional evidence (ignoring the objections defendants did make, see Pet. Br. 7, the court's overruling of those objections based on the need for expedition, *id.*, and the court's discomfort with the speed of the proceedings, *id.* at 7-8). But plaintiffs were entitled to seek emergency relief, and the State could not object on the ground that they had to participate by telephone, that no discovery had occurred, that defendants' witnesses were not prepared or available, and that other due process protections that precede trial had not occurred. That is the nature of an emergency proceeding.

There are tradeoffs that result from litigating a claim in an emergency proceeding. Plaintiffs obtain the benefit of a more

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[5] In a related point, plaintiffs speculate that courts do not vacate preliminary injunctions when they become moot because sometimes they have *res judicata* effect. Resp. Br. 28 & n.11. In fact, this general practice results from the fact that "a prior ruling need not be vacated [when] there is no possibility that it will have any collateral consequences." 13A Wright et al., *supra*, § 3533.10, at 437. *See also Gjertsen* v. *Bd. of Elec. Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (generally "since only a final judgment has res judicata or collateral estoppel effect, there is no harm in letting an interlocutory order stand"). Any limited preclusive effect of a preliminary injunction would not confer prevailing-party status unless it resulted in the favorable resolution of a plaintiff's legal claim.

relaxed merits inquiry, of a veritable presumption of irreparable harm in the First Amendment context, and of expeditious interim relief. But in accepting those benefits, plaintiffs must accept the consequence that their temporary relief alone did not entitle them to fees. They still must prove their case; they must win on some claim to prevail.

The litigation of the substance of plaintiff's claim at the preliminary-injunction stage underlines this point.[6] Although plaintiffs fault the State officials' position that the "nudity ban was a reasonable restriction," Resp. Br. 39, the district court adopted the State's position as its final unappealed ruling. Pet. App. 42a-46a. See also *id.* at 7a-8a n.7 (plaintiffs "were unable to achieve actual success on the merits").

Plaintiffs try to rewrite history to make their preliminary injunction at least a potential victory on the merits by asserting that it was based on a claim that the State officials' decision was content-based. This conflicts with the district court's express statement that it assumed content neutrality, as well as the court of appeals' reliance on this assumption, see *id.* at 6a-7a n.4. In fact, plaintiffs' motion did not assert that the denial was content-based (other than because it contained nudity); and the district court simply misinterpreted

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[6] Plaintiffs contend that the State officials' letter authorizing plaintiffs to conduct their protest so long as they complied with the minimum-clothing requirement "was directly contrary to a pre-existing court approved settlement." Resp. Br. 39. In fact, that settlement agreed to only a single nude expressive event on *February 19, 1996*, and authorized performance of the nude expressive activity *with* restrictions (a screen and signs). *See* Pet. Br. 4-5. The demonstrators did not remain behind the screen in 1996, and Wyner did not intend to remain behind the screen on February 14, 2003, *id.* at 7. And, as plaintiffs are aware, the State rejected a request from plaintiff that she be permitted to perform nude in 2001. *Id.* at 5. The State officials' actions did not contravene any settlement agreement.

the telephonic testimony of a park official, see J.A. 76-77.[7] Any claim of content-based discrimination vanished with summary judgment, Pet. App. 41a, and appeal, *id.* at 6a-7a.

Plaintiffs' post hoc argument is also unavailing as a matter of law. Federal Rule of Civil Procedure 65(d) requires that "[e]very order granting an injunction . . . shall set for the reasons for its issuance" and "shall be specific in terms." The meaning of a preliminary injunction is governed by its terms. "[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders . . . ." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Thus, the district court's express assumption in the preliminary injunction that there was no content-based discrimination is binding, and plaintiffs cannot revise that injunction to suit their purposes on appeal.

In sum, plaintiffs obtained a preliminary injunction only because the court lacked a full picture of the law and facts. If plaintiffs wanted a merits determination instead of preliminary relief, they would have had to seek relief under Fed. R. Civ. P. 65(a)(2), which authorizes a court to "'order the trial of the action on the merits to be advanced and consolidated with the hearing on the application'" for a preliminary injunction. See also *Camenisch*, 451 U.S. at 395.

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[7] *See* J.A. 77 (COURT: "What does that mean? They both had nudity, and you say this one is different, what's different about it?" WITNESS: "[S]ometimes they had nudity, sometimes they didn't, sometimes they were told they had to go behind the screen, sometimes it was five people, sometimes it was fifty people." COURT: "Any other issues? Numbers of people, whether the screen is there, anything else?" WITNESS: "Well, the previous plays, you know, talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration." COURT: "Why is that significant?" WITNESS: "Well, just that, from an operations standpoint, I mean the play is not significant, but the number of people could be different so we have to just take that into consideration.")

They did not. Having enjoyed the benefits of temporary relief, plaintiffs must likewise accept its limitations.

4. Plaintiffs claim that this Court has conferred prevailing-party status in two settings that fall short of full adjudication of the merits, Resp. Br. 29, and therefore that a preliminary injunction is sufficient. Plaintiffs' arguments do not respond to the State's contention that for plaintiffs to prevail, the defendants must bear legal responsibility for providing relief that resolves a legal claim, and are wrong on their own terms.

First, they note that a plaintiff who receives a "court-ordered consent decree[]" prevails, *Buckhannon*, 532 U.S. at 604, and that a consent decree does not entail full adjudication of the merits. Resp. Br. 31. Unlike a preliminary injunction, however, a consent decree is *not* interlocutory and provisional; instead, it resolves a plaintiffs' claim by ordering permanent relief enforceable by the court. *Buckhannon*, 532 U.S. at 604 & n.7. Conferring prevailing-party status on a plaintiff who obtains a consent decree does not violate the fundamental rule that a plaintiff "must be able to point to a *resolution* of the dispute which changes the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n*, 489 U.S. at 792 (emphasis added). The opposite is true with respect to a preliminary injunction.

For similar reasons, plaintiffs inaptly rely on *Shalala* v. *Schaefer*, 509 U.S. 292 (1993). Resp. Br. 33. Under the statutory provision at issue in *Schaefer*, a plaintiff who obtains a vacatur of an agency denial of benefits and a remand to the agency has received not an interim or interlocutory decision, but a *final judgment on the merits that conclusively determines that the government violated federal law and ends the litigation in a court of law*. 509 U.S. at 296-98. The statutory scheme thus effectively defines prevailing-party status as receipt of a final judgment vacating a denial of benefits and remanding the matter to the agency. Indeed, *Schaefer*'s holding is that the judicial decision at issue was a *final* order (with the implications of such finality on the

running of the time for appeal). *Id.* at 297. This case does not assist plaintiffs' cause because, unlike a consent decree and the judgment in *Schaefer*, a preliminary injunction does impose upon the defendant legal responsibility for relief that resolves a claim as is required for prevailing-party status.

An interim order that addresses the potential merits but does not resolve a claim or provide final relief to the plaintiffs does not confer prevailing-party status. Interim favorable "legal holdings en route to a final judgment" are "not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 762, 760. See also *Hanrahan*, 446 U.S. at 759 (favorable rulings, including reversal of a directed verdict, are "not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party"); *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (plaintiff whose legal rights were violated does not prevail when the declaratory relief did not inure to his benefit).

5. Plaintiffs next argue that *permanent* injunctions support prevailing-party status and that the inquiries for preliminary and permanent injunctions "do not differ in any significant respect." Resp. Br. 29. In fact, the significant respect in which they differ is that plaintiffs must win. The plaintiff must demonstrate *actual success* on the merits, not a prediction of success; and the defendant must be shown to have violated federal law. See *Camenisch*, 451 U.S. at 395. The State's view thus does not "make every permanent injunction ineligible to convey prevailing party status, regardless of the strength of the merits." Resp. Br. 30 (emphasis omitted). A plaintiff who obtains a permanent injunction achieves actual success on the merits (unless it is reversed on appeal).

6. Plaintiffs argue that conferring prevailing-party status on those who do not obtain a full adjudication on the merits, such as those who obtain consent decrees, promotes judicial economy by obviating any need for such parties to litigate the matter to final judgment in order to support a fees award.

These considerations are inapt in the preliminary-injunction context. A plaintiff who obtains only a preliminary injunction has not received an order resolving a claim and making defendant legally responsible for relief, unlike one who obtains a consent decree. That plaintiff should not be treated as someone who has won relief for a claimed constitutional violation. And state officials seeking to defend their laws' constitutionality should not be treated as lawbreakers or penalized for conserving governmental and judicial resources by focusing on the merits decision rather than a highly disruptive emergency appeal.

Conferring prevailing-party status on plaintiffs who receive an injunction without more simply encourages plaintiffs with borderline cases to seek preliminary injunctions, where the standard of proof on the merits is lower. Plaintiffs' proposed rule would not encourage defendants to settle; it would encourage them not to enforce their laws pending a merits determination for fear of being required to pay attorney's fees even if the law were ultimately deemed constitutional. Any argument that awarding fees to plaintiffs who obtain only a preliminary injunction will have beneficial consequences is highly debatable.

Notably, the incentives plaintiffs posit would be perverse in this case. On plaintiffs' theory, the State officials here should have been encouraged by the entry of the preliminary injunction to settle and agree not to enforce their laws, although final judgment was entered in their favor and the constitutionality of their laws was upheld. The State has a strong interest in the enforcement of its valid laws and should not be "discouraged" for fear of paying fees for interim orders in non-meritorious cases.

7. Plaintiffs also claim that preliminary injunctions confer prevailing-party status based on § 1988's legislative history indicating that a preliminary injunction is sufficient and that a plaintiff is not required to obtain a *final* order to be a prevailing party. Resp. Br. 32-33, 37-38. The legislative

history does not indicate that preliminary injunctions confer prevailing-party status. Nor does the legislative history support plaintiffs' claim that something short of relief that definitively resolves a plaintiff's claim supports prevailing-party status.

In the cited legislative history, Congress stated that courts could award attorney's fees *before* a final order (*pendente lite*), and clarified that interim fee awards might be appropriate where plaintiffs have obtained a favorable judgment on the merits of at least one of their claims.[8] This does not support any alteration of the requirement that a plaintiff actually prevail on some claim.[9]

Bradley v. *School Board*, 416 U.S. 696 (1974), relied on in the legislative history, proves our point. *Bradley* did not involve a preliminary injunction; the plaintiffs had won *permanent* injunctive relief years before and were awaiting final approval of a series of desegregation plans. This Court concluded that in the circumstances of that case, it was unfair to the plaintiffs who had prevailed "[t]o delay a fee award until the entire litigation is concluded," *id.* at 722-23, and authorized interim fees awards. Nothing in *Bradley* (or the legislative history) suggests that a plaintiff who obtains only

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[8] *See* H.R. Rep. No. 94-1558, at 8 (1976) ("awards pendente lite are particularly important in protracted litigation, where it is difficult to predict with any certainty the date upon which a final order will be entered"); S. Rep. No. 94-1011, at 5 (1976) ("In appropriate circumstances, counsel fees under [the Act] may be awarded pendente lite. Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.") (citation omitted).

[9] Plaintiffs claim that they "finally prevailed" on their "claim for relief for the February 14, 2003 anti-war protest," Resp. Br. 39 n.14. But that is not a claim for relief – plaintiffs' legal claim was that the application of the State's nudity ban was a violation of their First Amendment rights – a claim that was lost on summary judgment.

temporary relief in a case pending decision on the merits is entitled to fees from a defendant not found to have violated federal law.

II. EITHER THE SUMMARY JUDGMENT ORDER OR, ALTERNATIVELY, THE MOOTING OF PLAINTIFFS' CLAIM BEFORE JUDGMENT PRECLUDES PREVAILING-PARTY STATUS.

A. Plaintiffs Lost This Case.

Plaintiffs' post hoc attempt to recast the preliminary injunction as enjoining a content-based decision, distinct from the summary judgment decision rejecting plaintiffs' constitutional challenge to the application of the nudity ban, is factually and legally wrong. Thus, even if some preliminary injunctions could support prevailing-party status, this one cannot. See Pet. Br. 28-31.

B. Prevailing-Party Status Cannot Be Based On A Preliminary Injunction Issued On A Legal Claim That is Mooted Before Decision.

Assuming *arguendo* that the summary judgment decision did not effectively reject the basis for the preliminary injunction, plaintiffs still would not be entitled to fees because the legal claim underlying the preliminary injunction issue was mooted before it was resolved. See Pet. App. 5a n.1. An underlying *merits* decision in a case mooted by happenstance or the prevailing party is vacated and given no legal effect. See *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("[a]n order vacating the judgment on grounds of mootness would deprive [a plaintiff] of its claim for attorney's fees under . . . § 1988 . . . because such fees are available only to a [prevailing] party"); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("vacatur must be decreed for those judgments whose review is . . . prevented through happenstance") (internal citation and quotations omitted). A preliminary injunction should fare no better.

Plaintiffs say *Lewis* is irrelevant because this Court declined to decide whether fees are appropriate when a plaintiff secures final judgment on underlying claims that a defendant cannot appeal owing to mootness. Unlike in *Lewis*, plaintiffs here did not prevail on their underlying claim; and, as noted in Pet. Br. 33 & n.18, the preliminary injunction here was mooted *prior to any final judgment*. *Lewis* held that plaintiffs did not prevail because the circuit court's decision was moot prior to its final ruling. Plaintiffs who obtain preliminary injunctions on claims that are never resolved by the district court meet the same fate.

Indeed, in *Buckhannon*, this Court held that a plaintiff was not a prevailing party even when the *defendant's voluntary conduct* mooted a plaintiff's claim before judgment. Because the state's voluntary mooting of the lawsuit prevented the entry of a final judgment, it foreclosed any "corresponding alteration in the legal relationship of the parties," and the plaintiff was ineligible for fees. 532 U.S. at 605. *Buckhannon*'s logic entails the conclusion that plaintiffs' as-applied challenge to the nudity ban cannot support prevailing-party status because it became moot before it could be resolved.[10]

Plaintiffs and their amici claim that § 1983 claims often will be resolved by preliminary injunction and inherently mooted shortly thereafter. For that policy reason, they assert that preliminary injunctions must be able to provide the basis for an attorney's fees. Resp. Br. 40. Plaintiffs fail to address the established exception to the mootness doctrine for such

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[10] Plaintiffs say that plaintiff Simon lacked standing to pursue any claim other than an as-applied challenge to the nudity ban on February 14, 2003. From this, they conclude that the claims addressed in the summary judgment order finally dismissing their case must be different. Resp. Br. 44-45. The significance of Simon's lack of standing after February 14, 2003 is simply that his as-applied challenge to the nudity ban could have been dismissed for lack of jurisdiction, as well as lack of merit.

matters (capable of repetition yet evading review); indeed, one case plaintiffs cite notes that this exception is routinely applied in election cases. See *Gjertsen*, 751 F.2d at 202 (citing *Moore* v. *Ogilvie*, 394 U.S. 814 (1969)). Nor do plaintiffs confront this Court's established rule that a defendants' voluntary cessation of an illegal activity does not moot a claim. See *Friends of the Earth, Inc.* v. *Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 173 (2000). And, plaintiffs do not address the potential for damages claims. These points were cited by this Court in rejecting the catalyst theory in *Buckhannon*, 532 U.S. at 605-08. Finally, plaintiffs ignore the fundamental unfairness to state officials of holding that a plaintiff is a prevailing party based on a preliminary determination of the merits in which the State lacked a full opportunity to defend.

CONCLUSION

For these reasons and those set forth in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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April 9, 2007

Supreme Court, U.S.
FILED
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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 06-531 Petition For A Writ Of Certiorari at the following pages.

Wyner v. *Struhs*, No. 04-14750-CC (11th Cir. July 17, 2006) (order denying rehearing and rehearing en banc) 49a-50a

Wyner v. *Struhs*, 179 Fed. App'x 566 (11th Cir. 2006)..... 1a-8a

Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Jan. 28, 2004) (order on motions for summary judgment) 23a-48a

Wyner v. *Struhs*, 254 F. Supp. 2d 1297 (S.D. Fla. 2003) (corrected order granting motion for preliminary injunction)..... 9a-22a

The following document has been omitted in the printing of this Joint Appendix. It may be found in the Respondents' Appendix to the 06-531 Brief In Opposition To Petition For A Writ Of Certiorari at the following pages.

Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Aug. 16, 2004) (omnibus order)..... 1a-13a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach)

[Filed 02/12/2003]

Case No. 9:03-cv-80103-DMM

T.A. WYNER, GEORGE SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/12/2003	1	VERIFIED COMPLAINT filed; FILING FEE $150.00 RECEIPT # 717717; Magistrate Judge Linnea R. Johnson (Former Deputy Clerk) (Entered: 02/13/2003)
		* * * *
02/12/2003	4	EMERGENCY MOTION by T. A. Wyner, George Simon for temporary restraining order, and/or for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)
02/12/2003	5	MEMORANDUM by T. A. Wyner, George Simon in support of [4-1] motion for temporary restraining order, [4-2] motion for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)

DATE	NO.	PROCEEDINGS
		* * * *
02/12/2003	7	NOTICE of Hearing: Motion hearing before Judge Donald M. Middlebrooks set for 2:00 2/13/03 for [4-1] motion for temporary restraining order, set for 2:00 2/13/03 for [4-2] motion for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)
02/13/2003	8	ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION:ORDER granting [4-1] motion for temporary restraining order, granting [4-2] motion for preliminary injunction (Signed by Judge Donald M. Middlebrooks on 2/13/03) [EOD Date: 2/13/03](Former Deputy Clerk) Modified on 02/24/2003 (Entered: 02/13/2003)
		* * * *
02/27/2003	11	CORRECTED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION: CORRECTED ORDER amending [8-1] order. Motion for Preliminary Injunction is granted. The parties have agreed that security is not necessary in this instance and therefore none will be required (Signed by Judge Donald M. Middlebrooks on 2/27/03) [EOD Date: 2/28/03] (Former Deputy Clerk) (Entered: 02/28/2003)
03/05/2003	12	Transcript filed re: TRO Hearing held 2/13/03 before Judge Donald Middlebrooks Volume #: 1 Pages: 1-90 (Former Deputy Clerk) (Entered: 03/05/2003)

DATE	NO.	PROCEEDINGS
03/25/2003	13	MOTION by David B. Struhs, Terence Coullitte to dismiss count II of plaintiffs complaint (Former Deputy Clerk) (Entered: 03/26/2003)
		* * * *
03/25/2003	15	Answer and affirmative defenses by David B. Struhs, Terence Coullitte (Attorney James Orrin Williams Jr.),; jury demand (Former Deputy Clerk) (Entered: 03/26/2003)
		* * * *
04/14/2003	17	ORDER ON MOTION TO DISMISS denying [13-1] motion to dismiss count II of plaintiffs complaint is DENIED AS MOOT. (Signed by Judge Donald M. Middlebrooks on 4/14/03) [EOD Date: 4/14/03] (at, Deputy Clerk) (Entered: 04/14/2003)
		* * * *
11/17/2003	45	MOTION with memorandum in support by David B. Struhs for summary judgment (Former Deputy Clerk) (Entered: 11/18/2003)
		* * * *
12/08/2003	55	MOTION with memorandum in support by T. A. Wyner, George Simon for summary judgment (kw, Deputy Clerk) (Entered: 12/09/2003)

DATE	NO.	PROCEEDINGS
12/08/2003	56	NOTICE of filing exhibits and deposition excerpts in support of plaintiffs' motion for summary judgment and in oppostiion [sic] to defendants' motion for summary judgment, by T. A. Wyner, George Simon (Former Deputy Clerk) (Entered: 12/09/2003)
12/08/2003	57	Statement of material undisputed facts in support, by T. A. Wyner, George Simon re: [55-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/09/2003)
12/08/2003	58	RESPONSE by T. A. Wyner, George Simon in opposition to [45-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/09/2003)
		* * * *
12/29/2003	69	MEMORANDUM by David B. Struhs, Terence Coullitte in opposition to [55-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/30/2003)
		* * * *
01/12/2004	77	REPLY by T. A. Wyner, George Simon to response to [55-1] motion for summary judgment (kw, Deputy Clerk) (Entered: 01/13/2004)
		* * * *

DATE	NO.	PROCEEDINGS
01/28/2004	83	ORDER ON MOTIONS FOR SUMMARY JUDGMENT: ORDER granting in part, denying in part [45-1] motion for summary judgment, denying [55-1] motion for summary (Signed by Judge Donald M. Middlebrooks on 1/28/04) [EOD Date: 1/28/04] (Former Deputy Clerk) (Entered: 01/28/2004)
01/28/2004	84	FINAL JUDGMENT for David B. Struhs, Terence Coullitte against T. A. Wyner, George Simon. The Court retains jurisdiction for the purpose of awarding costs and fees, including those expended on the motion for Preliminary Injunction upon which plaintiffs prevailed. It is further ordered, that the Clerk of Court shall close this case and all pending motions are denied as moot (Signed by Judge Donald M. Middlebrooks on 1/28/04) [EOD Date: 1/29/04] (Former Deputy Clerk) (Entered: 01/29/2004)
		* * * *
02/11/2004	85	MOTION by David B. Struhs, Terence Coullitte to alter or amend [84-1] judgment order (Former Deputy Clerk) (Entered: 02/12/2004)
02/25/2004	86	RESPONSE by T. A. Wyner, George Simon to [85-1] motion to alter or amend [84-1] judgment order (kw, Deputy Clerk) (Entered: 02/25/2004)
		* * * *

DATE	NO.	PROCEEDINGS
02/27/2004	89	MOTION by T. A. Wyner, George Simon for attorney fees , and reimbursement of litigation expenses (kw, Deputy Clerk) (Entered: 03/01/2004)
02/27/2004	90	MEMORANDUM by T. A. Wyner, George Simon in support of [89-1] motion for attorney fees, [89-2] motion reimbursement of litigation expenses (kw, Deputy Clerk) (Entered: 03/01/2004)
		* * * *
03/08/2004	93	REPLY by David B. Struhs, Terence Coullitte to response to [85-1] motion to alter or amend [84-1] judgment order (Former Deputy Clerk) (Entered: 03/09/2004)
		* * * *
03/23/2004	97	OPPOSITION by Terence Coullitte, David B. Struhs to [89-1] motion for attorney fees, [89-2] motion reimbursement of litigation expenses (at, Deputy Clerk) (Entered: 03/24/2004)
		* * * *
04/07/2004	101	REPLY by T. A. Wyner, George Simon to response to [89-1] motion for attorney fees (kw, Deputy Clerk) (Entered: 04/07/2004)

DATE	NO.	PROCEEDINGS
08/16/2004	102	OMNIBUS ORDER granting in part, denying in part [85-1] motion to alter or amend [84-1] judgment order. The Clerk of COurt [sic] shall enter judgment in favor of the plaintiffs and as against defendsnts [sic] for $25,924.50 representing attorneys' fees (Signed by Judge Donald M. Middlebrooks on 8/16/04) [EOD Date: 8/18/04] (Former Deputy Clerk) (Entered: 08/18/2004)
09/14/2004	103	NOTICE OF APPEAL by David B. Struhs, Terence Coullitte of [102-1] order, [84-1] judgment order EOD Date: 8/18/04 and 1/29/04; Filing Fee: $ 255.00; Receipt #: 531921 Copies to USCA and Counsel of Record. (Former Deputy Clerk) (Entered: 09/14/2004)

* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

04-14750-CC

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
04/25/2006	Judgment Entered
04/25/2006	OPIN1A (Notice of issuance of opinion) issued. Costs taxed against the Defendants-Appellants. c:Barbara Jeanne Taggart; c:Carri S. Leininger; c:Donald M. Middlebrooks; c:James K. Green; c:Randall C. Marshall
	* * * *
05/16/2006	Petition for Rehearing En Banc: (Atty: Carri S. Leininger)—David B. Struhs
07/17/2006	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED

DATE	PROCEEDINGS

* * * *

01/16/2007 Certiorari Granted S Ct # 06-531: (Atty: Carri S. Leininger)—Terence Coullitte

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 03-8103

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

vs.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

VERIFIED COMPLAINT

Plaintiffs, T.A. WYNER and GEORGE SIMON, sue defendants, DAVID B. STRUHS and TERENCE COULLITTE and allege:

INTRODUCTION

1. By this action, Plaintiff T.A. Wyner seeks intervention from this Court to prevent state park officials from arresting her or otherwise interfering with her peaceful, expressive activity at a state park, merely because it contains some innocent, non-erotic nudity. Her expressive activities and those of her allies at this park have, in the past, always been peaceful. Nevertheless, they have triggered arrests and spawned various civil rights actions and appeals.

2. From 1995 until now, defendants acknowledged in a court settlement that that nudity coupled with expressive activity is protected by the First Amendment. *See* Stipulation

for Settlement, *Simon v. DeWald*, attached as Exhibit 1. Late last week, however, defendants disavowed that agreement. Plaintiff Wyner is thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)(federal court intervention is appropriate in circumstances such as this). Specifically, Plaintiff Wyner wants to engage in peaceful, expressive activity similar to that which she has engaged in the past at McArthur Beach State Park, but wants to avoid being arrested by defendants, whose predecessors have arrested her for such activity in the past. And, pursuant to his Stipulation for Settlement with Defendants wherein they recognize that nudity coupled with expressive activity is protected by the First Amendment, Plaintiff Simon wants to witness Plaintiff Wyner's expressive activity.

3. Plaintiffs jointly challenge the customs, policies, and practices of the Florida Department of Environmental Protection ("DEP"), and its employees, in denying persons their First Amendment and state constitutional rights of free expression and to receive information and participate in plays or other expressive conduct conducted in a public forum.

4. All acts material hereto occurred in Palm Beach County, Florida.

5. At all material times hereto, defendants were acting under color of state law.

JURISDICTION

6. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343, providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringement of civil rights; pursuant to 28 U.S.C. §1331, providing for jurisdiction in cases arising under the Constitution and laws of the United States; and pursuant to 28

U.S.C. §§ 2201 and 2202, providing for declaratory and injunctive relief. This case arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, creating a federal cause of action for violations of these civil rights.

PARTIES

7. Plaintiff T.A. Wyner, ("Ms. Wyner"), was at all material times hereto a resident of St. Lucie County, Florida.

8. Plaintiff George Simon ("Mr. Simon"), although currently a resident of Maui, Hawaii, was a previous resident of St. Lucie County, Florida. Mr. Simon desires to attend the protest activities that underlie this litigation.

9. Defendant David B. Struhs, was at all material times hereto the Secretary of the Florida Department of Environmental Protection ("DEP"), a department, agency, or subdivision of the State of Florida, and is responsible for administering, regulating, and controlling the operation of the public parks including the John D. MacArthur Beach State Park, pursuant to Section 258.004, Florida Statutes. Secretary Struhs is sued in his official capacity for injunctive and declaratory relief only.

10. Defendant Terence Coulliette, was at all material times hereto a park manager employed by the DEP. The park that he manages is located in Palm beach [sic] County, Florida, and is the site of the expressive activity. He is sued in his individual capacity for damages and in his official capacity for injunctive and declaratory relief.

FACTS

11. Plaintiff Wyner has a long history of expressive conduct within the John D. MacArthur Beach State Park, which the Eleventh Circuit has previously determined is a public forum. *See Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992).

12. Similarly, plaintiff Simon has a long history of being present in the audience when such expressive conduct was engaged in by Ms. Wyner and others, and has served as a videographer during such the performance of such expressive conduct.

13. Such expressive conduct has included nudity in the production of plays and in protests within the park.

14. For example, in July 1990, Ms. Wyner and a group of supporters went to John D. MacArthur State Park to conduct a peaceful demonstration on a public beach. Ms. Wyner intended through her protest to challenge recently adopted Departmental regulations which purported to prohibit beachgoers from exercising their rights under the First Amendment to leaflet, collect petitions, assemble peacefully, and speak on matters of public concern, and which regulated bathing attire.

15. Ms. Wyner and her supporters went to a remote and largely deserted area of the beach and gathered near the dune line, away from others who were using the beach. Out of respect for the privacy of other beachgoers, she first asked whether her presence would annoy or offend anyone. She then explained that she and her supporters had come to exercise the rights protected by the First Amendment. She distributed several copies of the Bill of Rights, asking the recipients to take care not to litter the beach. She solicited the signatures of those within earshot for a petition "encouraging legislators . . . to make no law abridging freedom of speech. . ." At Ms. Wyner's invitation, other beachgoers came forward to peacefully speak in opposition to state regulation of free expression. Some of the speakers objected to the state's ban on nude sunbathing at what they believed to have always been a clothing optional beach.

16. Throughout the assembly, Ms. Wyner and those who accompanied her spoke peacefully, sometimes humorously, but always orderly, never causing, threatening or encouraging

a breach of the peace. As the demonstration progressed, Ms. Wyner invited beachgoers to come forward to show their bathing suits as a means of protesting the content of Departmental bathing attire regulations.

17. After explaining to the assembled group that she depended on the Bill of Rights to protect her from violating the Departmental regulations, Ms. Wyner removed her t-shirt, revealing an opaque rectangular copy of the Bill of Rights extending from above her nipples and below her genitalia, and stars covering portions of her buttocks.

18. Dozens of law enforcement officers summoned by the former Park Manager accompanied Ms. Wyner, traveling on foot, on horseback, in motorized vehicles, and in a helicopter. Several seconds after Ms. Wyner displayed the Bill of Rights as her bathing attire, she was arrested and charged with disorderly conduct. A county court judge subsequently dismissed the charge for lack of probable cause.

19. Following the dismissal of the disorderly conduct for lack of probable cause, Ms. Wyner sued for damages in state court for violation of her First and Fourth Amendment rights, and was awarded damages by a jury only to lose them on appeal, based upon an appellate court determination that park officials were entitled to qualified immunity. *See DeWald v. Wyner*, 674 So.2d 836 (Fla. 4 DCA 1996).

20. Similarly, in 1991, Ms. Wyner was arrested for nudity in a public place while performing in a play, *MacArthur: The Man and the Beach*, in the historically clothing optional section of MacArthur Beach. Ms. Wyner was also the director of the play.

21. The play was an artistic, theatrical and audience participatory performance documenting the history of Palm Beach County's clothing optional beach and John D. MacArthur, the man who donated the beach to the State of Florida.

22. The charges brought against Ms. Wyner and others were dismissed.

23. In 1995, plaintiffs Wyner and Simon, a member of the audience, instituted actions in the Palm Beach County court, *T.A. Wyner v. DeWald, et al.*, Case No. MC-95-720, and *George Simon v. Laura DeWald, et al.*, Case No. MC-95-2659, alleging that their constitutional rights had been violated by the 1991 arrest and consequent interruption of the play.

24. By stipulation dated May 12, 1995, the DEP defendants settled the Simon action by, *inter alia*, stipulating that "[w]hile defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *See* Stipulation for Settlement, *Simon v. DeWald*, attached as Exhibit 1.

25. The stipulation then set out a reasonable manner for the play to again be presented at MacArthur Beach State Park.

26. From 1988 through 2002, Ms. Wyner produced or acted in plays, demonstrations, performances and protests in MacArthur Beach State Park, including innocent nudity in combination with other forms of political and artistic expression, with constant threat of arrest by defendants or their predecessors in office, but with no actual arrests since 1991.

27. During that period of time, there was no interruption to, or adverse effect upon, the efficient operation of the Park as a result of any nudity involved in Ms. Wyner's expressive conduct.

28. Although at one time defendant DEP (or its predecessor) required a permit to engage in expressive conduct in MacArthur Beach State Park, no permit is currently required.

29. Rather, Florida Administrative Code 62D-2.014(18) provides:

> Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

30. In mid-January, 2003, Ms. Wyner called defendant Coulliette to let him know of her intent to engage in a peaceful demonstration during the annual Winter Naturist Gathering in Palm Beach County which would include the creation of a temporary art installation comprised of nude bodies in the form of a peace sign. The demonstration is scheduled for February 14, 2003 (Valentine's Day). It is Ms. Wyner's intention to produce and direct the image.

31. After discussing her plans with his supervisor, Mr. Coulliette telephoned Ms. Wyner and asked that she repeat her plans in writing. She did so by e-mail, a copy of which is attached as Exhibit 2.

32. Mr. Coulliette responded by e-mail, explaining that he would forward the letter to Mr. George Jones, Bureau Chief, Parks District Five for his review. A copy of Mr. Coulliette's e-mail message is attached as Exhibit 3.

33. By letter dated February 6, 2003, Mr. Coulliette informed Ms. Wyner that DEP had concluded that the nudity

involved in the planned demonstration was not "expressive conduct protected by the First Amendment," and that even if it were, DEP was implementing a "reasonable manner restriction" prohibiting any nudity and requiring adherence to the clothing requirements of the Department's bathing and swimming regulations. A copy of the letter is attached as Exhibit 4.

34. Plaintiff desires to engage in expressive conduct on Valentine's Day, February 14, by producing, directing, and participating in the display of a temporary art installation c[illegible]prised of nude bodies in the form of a peace sign.

35. Because of the Department's past actions, including but not limited to Ms. Wyner's arrest and those of others for engaging in expressive activities, and defendants' position outlined in the February 6 (Exhibit 4) letter, Ms. Wyner fears that she will be arrested for engaging in such expressive conduct or that defendants and/or their employees or agents will interfere with her peaceful protest.

36. Plaintiff Simon desires to observe the peaceful protest on February 14, 2003, and has purchased an airline ticket to travel from his home in Hawaii to Fort Lauderdale, Florida, so that he can be present. However, Mr. Simon desires to view the protest and display in an uncensored form.

37. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs herein alleged. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendants' acts, policies and practices unless they are granted the relief prayed for herein. Plaintiff Wyner intends to conduct expressive activity in the future at this park which will include non-erotic displays of nude bodies. Defendants' reneging upon their 1995 settlement chills Ms. Wyner's future plans.

COUNT I

(Violation of First and Fourteenth Amendment Rights)

38. Plaintiffs reallege and adopt paragraphs 1 through 37 as if fully set forth herein.

39. Defendants' stated requirements outlined in their February 6, 2003, letter deprives Plaintiffs of their rights guaranteed by the First and Fourth Amendments to the United States Constitution.

40. Defendants' stated requirements outlined in their February 6, 2003, letter operates as an unconstitutional prior restraint upon plaintiff Wyner's protected expressive activities.

41. Florida Administrative Code 62D-2.014(18) vests unfettered discretion upon the Park Manager to restrict constitutionally protected expressive activities in MacArthur Beach State Park and such discretion is not circumscribed by any standards.

42. Defendants' actions are with deliberate indifference and reckless disregard towards Plaintiffs and other participants and observers in denying them the right to engage in constitutionally protected expressive activities and the right to receive uncensored information.

43. 42 U.S.C. Section 1983 provides a remedy for Defendants' actions.

WHEREFORE, Plaintiffs demand judgment against Defendants for:

(a) injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003;

(b) declaratory relief that defendants' actions constitute an improper prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution;

(c) declaratory relief that Florida Administrative Code 62D-2.014(18) is unconstitutional both upon its face and as applied to plaintiffs;

(d) injunctive relief prohibiting defendants from interfering with future expressive activities that may include non-erotic displays of nude human bodies;

(e) compensatory damages against defendant Coulliette individually;

(f) nominal damages against defendant Coulliette individually;

(g) punitive damages against defendant Coulliette individually; and

(h) attorneys' fees and costs pursuant to 42 U.S.C. Section 1988.

COUNT II

(Article I, Section 4 Claim Under the Florida Constitution)

44. Plaintiffs reallege and adopt paragraphs 1 through 37 as if fully set forth herein.

45. Article I, section 4 of the Florida Constitution states:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

46. Defendants' policy, custom, and practice of limiting or otherwise interfering with expressive conduct that includes nudity within MacArthur Beach State Park violates Article I, Section 4 of the Florida Constitution.

WHEREFORE, plaintiffs respectfully request that this Court:

(a) award compensatory damages against defendant Coulliette personally;

(b) grant injunctive relief; and

(c) award such additional or alternative relief as may be just, proper and equitable.

Respectfully submitted,
/s/ [illegible]
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VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct to the best of my personal knowledge and belief.

T.A. WYNER

By /s/ T.A. Wyner

Executed on February 12, 2003.

[Plaintiff's Exhibit 1]

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA.
CIVIL DIVISION

CASE NO. MC-95-2659-RB

GEORGE SIMON,

Plaintiff,

vs.

LAURA DE WALD, JOHN FILLYAW, RICHARD DOMROSKI and the DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

STIPULATION FOR SETTLEMENT

The parties, through counsel, hereby stipulate to settle this case as follows:

1. Defendants shall pay plaintiff the sum of Two Thousand, Five Hundred Dollars ($2,500.00) for damages and attorneys' fees and costs and plaintiff shall dismiss this action.

2. While defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner.

3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A. Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park on February 19, 1996 at the low tide closest to the noon hour or at a time to be agreed upon by the parties.

4. The play shall be performed at least 100 yards north of the northernmost boardwalk on the beach in an area from the dune line to the ocean.

5. Plaintiff and his representatives shall arrange for placement of a bolt of cloth in a semi-circle around the area where the play will be performed.

6. Plaintiff and his representatives may, at their sole discretion, erect two signs no larger than four (4) square feet each, advising beachgoers that a play will be performed within the cloth-enclosed theatre which includes nudity.

7. At least fourteen (14) days before the play, T.A. Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

8. The event shall retain jurisdiction to enforce the terms and conditions of this agreement.

DATED this 12th day of May, 1995.

/s/ James K. Green
JAMES K. GREEN
JAMES K. GREEN, P.A.
One Clearlake Centre,
Suite 1503
750 Australian Avenue South
West Palm Beach, FL 33401
(407) 659-2029
(407) 655-1357 (Facsimile)
Counsel for Plaintiff Simon
and for T. A. Wyner

/s/ Arthur C. Wallburg
ARTHUR C. WALLBURG, Esq.
Assistant Attorney General
Office of the Attorney General
FL-01 The Capitol
Tallahassee, FL 32399-1050
(904) 488-1573
(904) 488-4472 (Facsimile)
Counsel for Defendants

[Plaintiff's Exhibit 2]

James K. Green

From:	TAWyner@aol.com
Sent:	Wednesday, January 29, 2003 7:36 AM
To:	terence.coulliette@dep.state.fl.us
Cc:	JamesKGreen@bellsouth.net; ranger33133 @yahoo
Subject:	Peaceful Assembly on MacArthur Beach

Dear Mr. Coulliette

In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request that I repeat my plans in writing.

Friday, Valentine's Day, February 14, 2003, I plan to create a temporary art installation, comprised of nude bodies in the form of a peace sign. The installation will be located on the traditionally clothing optional section of AirForce/ MacArthur Beach.

Crew members will start arriving at the park at approximately 10:00 AM. Models will be positioned at approximately 11:30 AM and artists of multi-media (oil, photography, videography, live body cast sculpture and others) will document the installation until approximately 12:30 PM. The demonstration should be complete by 2:00 PM with most artists, models and crew departing the park.

Our long history on MacArthur Beach has included an acknowledgement by the 11th Circuit Court of Appeals that

the beach is a public forum, wherein therefore free speech cannot be prohibited. Our choice of mode of expression mirrors similar art installations by Salvador Dali and more recently the artist, Tunick, whose "bodyscapes" have been photographed in major cities all over the world and have been recognized as protected speech by the US Supreme Court.

I expect no more than 50 participants (artists, crew, models and audience) however I cannot predict nor be responsible for the number of people who choose that day to be in that public forum as a result of the art installation or otherwise.

I tried to gain information from your Nature Center as to the number of visitors scheduled for your daily nature tours or other events during the Winter Naturist Gathering and was told that there were no plans other than the daily nature walk and no group reservations for that day.

All of the above if offered in advance to express my intent to cooperate with you and DEP, even though I believe that the only permit I need to peacefully assemble in the public forum of MacArthur Beach is the First Amendment.

Please let me know what else I can do to make this a positive experience for you, your staff, my crew, artists, models and the public, while keeping the focus on the message of the art installation, "peace".

Sincerely,
T.A. Wyner
Theatre on the Beach
772.465-5658
tawyner@aol.com

[Plaintiff's Exhibit 3]

James K. Green

From: Coulliette, Terence [Terence.Coulliette@dep.state.us]
Sent: Wednesday, January 29, 2003 9:08 AM
To: TAWyner@aol.com
Cc: Jones, George; Jones, Daniel R.
Subject: RE: Peaceful Assembly on MacArthur Beach

Dear Ms. Wyner,

Thank you for taking the time to write this letter concerning your plans for the upcoming assembly on February 14th. I am sure that everything will work out fine, as we communicate effectively, and seek cooperation and understanding. As I mentioned on the telephone, I am forwarding your letter to Mr. George Jones, Bureau Chief, Parks District Five for his review, consideration and input. I will advise you as to any issues or concerns that may be brought to my attention. I do not anticipate any problems at this time.

Thank you for your patience and cooperation in this matter. I will be in touch as soon as I have further information. If I can be of further assistance, please let me know.

Sincerely,
Terry Coulliette, PMII
MacArthur Beach State Park

-------Original Message-------
From: TAWyner@aol.com [mailto:TAWyner@aol.com]
Sent: Wed 1/29/2003 7:35 AM
To: Coulliette, Terence
Cc: JamesKGreen@bellsouth.net; ranger33133@yahoo
Subject: Peaceful Assembly on MacArthur Beach

Dear Mr. Coulliette

In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request that I repeat my plans in writing.

Friday, Valentine's Day, February 14, 2003, I plan to create a temporary art installation, comprised of nude bodies in the form of a peace sign. The installation will be located on the traditionally clothing optional section of AirForce/ MacArthur Beach.

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Our long history on MacArthur Beach has included an acknowledgement by the 11th Circuit Court of Appeals that the beach is a public forum, wherein therefore free speech cannot be prohibited. Our choice of mode of expression mirrors similar art installations by Salvador Dali and more recently the artist, Tunick, whose "body-scapes" have been photographed in major cities all over the world and have been recognized as protected speech by the US Supreme Court.

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I tried to gain information from your Nature Center as to the number of visitors scheduled for your daily nature tours or other events during the Winter Naturist Gathering and was told that there were no plans other than the daily nature walk and no group reservations for that day.

All of the above if offered in advance to express my intent to cooperate with you and DEP, even though I believe that the only permit I need to peacefully assemble in the public forum of MacArthur Beach is the First Amendment.

Please let me know what else I can do to make this a positive experience for you, your staff, my crew, artists, models and the public, while keeping the focus on the message of the art installation, "peace".

Sincerely,

T.A. Wyner

Theatre on the Beach

772.465-5658

tawyner@aol.com

[Plaintiff's Exhibit 4]

[Logo]

Department of
Environmental Protection
John D. MacArthur Beach State Park
10900 State Road 703
North Palm Beach, Florida 33408
561-624-6950
February 6, 2003

Jeb Bush
Governor

David B. Struhs
Secretary

Ms. T. A. Wyner
#36
8800 Okeechobee Road
Ft. Pierce, Florida 34945

Dear Ms. Wyner:

After careful consideration, the Division of Recreation and Parks has made a decision on your request for time, place, and manner restrictions that will be applicable for your planned activities on February 14th, 2003 at John D. MacArthur Beach State Park. At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. You are of course free to conduct your activities, absent the nudity. You must wear the minimal amount of clothing in the Park as required by section 62D-2.014(7)(b), Florida Administrative Code, which I am informed you are well aware of. Recently the Division has made a decision that thong bathing suit bottoms are allowable attire under the rule. You should coordinate with the Park Manager to determine the most suitable location for your

activities. The activities are welcome during any hours the Park is open.

If you have any questions feel free to contact me at the above address or phone number.

Sincerely,

/s/ Terence Coulliette
TERENCE COULLIETTE,
Park Manager,

cc: Peter J. Scalco
George Jones

CIVIL COVER SHEET 03 - 80103 CIV-MIDDLEBROOKS

MAGISTRATE JUDGE JOHNSON

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

T.A. WYNER and GEORGE SIMON

DEFENDANTS DAVID B. STRUHS, in his official capacity as Secretary of the Florida Department of Environmental Protection, and TERENCE COULLETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF St. Lucie (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Palm Beach (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

03-80103-CV-DMM/LRJ

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

James K. Green, Esq.
JAMES K. GREEN, P.A.
(561) 659-2029
Ste. 1630
222 Lakeview Ave.
West Palm Bch. FL 33401

ATTORNEYS (IF KNOWN)

(d) CIRCLE COUNTY WHERE ACTION AROSE:
DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE, HIGHLANDS

II. BASIS OF JURISDICTION (PLACE AN X ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

§1983 action challenging park officials' restriction on expressive activity at state park

IVa. 3 days estimated (for both sides) to try entire case

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

A CONTACT	A TORTS	B FORFEITURE PENALTY	A BANKRUPTCY	A OTHER STATUS
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury-Med Malpractice ☐ 365 Personal Injury-Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 730 Labor/Management Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Employee Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS-Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/etc. ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes ☐ 890 Other Statutory Actions*
A REAL PROPERTY	A CIVIL RIGHTS	B PRISONER PETITIONS		
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☒ 440 Other Civil Rights	☐ 510 Motions to Vacate Sentence Habeas Corpus: ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition		

* A or B

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated ☐ 5 Transferred from another district (Specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A ☐ UNDER F.R.C.P. 23 **CLASS ACTION** **DEMAND $** Check YES only if demanded in complaint: ☐ YES **JURY DEMAND:** ☒ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 2/11/03 SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT
SD FLA
REV 9/94

FOR OFFICE USE ONLY: Receipt No. 117717 Amount: $150.00
Date Paid: _____ M/Mp: _____

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Feb. 12, 2003]

Case No. 03-80103

T.A. WYNER,

Plaintiff,

vs.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER and/or PRELIMINARY INJUNCTION

Pursuant to Fed.R.Civ.P. 65(a) and 65(b), plaintiffs move this Court for an order restraining defendants from requiring plaintiff Wyner, and/or other participants, to wear clothing when they participate in a Valentine's Day protest in John B. MacArthur Beach State Park, consisting, *inter alia*, of the formation of a temporary art installation comprised of nude bodies in the form of a peace sign. Because of the past history of defendants' interference with plaintiffs' constitutionally protected expressive activities in the park, plaintiffs further seek an order restraining defendants from any interference with the planned peaceful protest. Because the planned protest and expressive activities are scheduled for this Friday, February 14, 2003, plaintiffs request the Court, pursuant to S.D. Fla. L.R. 7.1E, to waive all time requirements and hold an immediate hearing on this motion.

Plaintiff Wyner has a long history of expressive conduct within the John D. MacArthur Beach State Park. The John D. MacArthur Beach State Park is a public forum. *See Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992). Such expressive conduct has included nudity in the production of plays and in protests within the park. By this action, Plaintiff T.A. Wyner seeks intervention from this Court to prevent state park officials from arresting her or otherwise interfering with her peaceful, expressive activity at the park, merely because it contains some innocent, non-erotic nudity, Her expressive activities and those of her allies at this park have, in the past, always been peaceful. Nevertheless, they have triggered arrests and spawned various civil rights actions and appeals.

From 1995 until now, defendants acknowledged in a court settlement that that nudity coupled with expressive activity is protected by the First Amendment. *See* Stipulation for Settlement, *Simon v. DeWald*, attached to the Verified Complaint as Exhibit 1, Late last week, however, defendants disavowed that agreement. Plaintiff Wyner is thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (federal court intervention is appropriate in circumstances such as this). Specifically, Plaintiff Wyner wants to engage in peaceful, expressive activity similar to that which she has engaged in the past at McArthur Beach State Park, but wants to avoid being arrested by defendants, whose predecessors have arrested her for such activity in the past. And, pursuant to his Stipulation for Settlement with Defendants wherein they recognize that nudity coupled with expressive activity is protected by the First Amendment, Plaintiff Simon wants to witness Plaintiff Wyner's expressive activity.

Plaintiffs jointly challenge the customs, policies, and practices of the Florida Department of Environmental Protection ("DEP"), and its employees, in denying persons their First Amendment and state constitutional rights of free expression and to receive information and participate in plays or other expressive conduct conducted in a public forum.

In support of this Motion, plaintiff would call the Court's attention to the Verified Complaint and Memorandum In Support Of Plaintiffs' Motion, filed simultaneously with this Motion. A proposed order granting this Motion is also submitted for the Court's consideration.

Respectfully submitted,

/s/ James K. Green
James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1630, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401
Florida Bar No: 229466
(561) 659-2029
(561) 655-1357 (facsimile)

Cooperating Attorney for the American Civil Liberties Union Foundation of Florida, Inc. – Palm Beach Chapter

Randall C. Marshall, Esq.
American Civil Liberties Union Foundation of Florida, Inc.
4500 Biscayne Blvd., Ste. 340
Miami, FL 33137-3227
Florida Bar No: 0181765
(305) 576-2337
(305) 576-1106 (facsimile)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO. 03-80103-CIV
West Palm Beach, Florida
February 13, 2003
2 o'clock, p.m.
Pages 1 to 90

T. A. WYNER & GEORGE SIMON,
Plaintiffs,

vs.

DAVID B. STRUHS, et al.,
Defendants.

TRANSCRIPT OF TRO HEARING
BEFORE THE HONORABLE DONALD MIDDLEBROOKS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiffs: Randall C. Marshall, Esq.

For The Defendants: Maureen Malvern, Esq.
Christine Guard, Esq.
Jeffrey Collier, Esq.

Court Reporter: Roger Watford, RMR
Official Court Reporter.
West Palm Beach, Florida

[2] THE COURT: This is the case of T. A. Wyner versus David Struhs, in his capacity as Secretary of the Florida Department of Environmental Protection, and Terence Coullitte, individually and in his capacity as park manager of John D. MacArthur State Park. The Case number is 03-80103. Could I please have appearances starting with plaintiff.

MR. MARSHALL: Yes, Your Honor, my name is Randall Marshall. I am with the American Civil Liberties Union Foundation of Florida. With me is plaintiff T. A. Wyner.

THE COURT: Good afternoon.

Okay, I think we have people on the phone as well, do we not?

MS. MALVERN: That's correct, Your Honor, Maureen Malvern, for the defendants, and with me are—

MS. GUARD: Christine Guard.

MR. COLLIER: And Jeffrey Collier.

THE COURT: And you represent both defendants?

MS. MALVERN: Yes.

THE COURT: Okay. I got Ms. Guard, but who is the third person, Jeffrey—

MR. COLLIER: Jeff Collier, Your Honor.

THE COURT: Collier, okay. Good afternoon.

MR. COLLIER: Good afternoon.

[3] MS. MALVERN: Good afternoon.

THE COURT: Okay, yesterday we received a complaint and motion for temporary restraining order and/or preliminary injunction. In reviewing it we noted that the plaintiff wanted to or intended to be involved in a protest or some sort

of, we'll hear more about what exactly, but some sort of a display tomorrow morning.

And so, although that was exceedingly short notice, we went ahead and set a hearing and directed that both parties be notified so that we could get some briefing, I will say I guess I was disturbed somewhat about the short notice, given the imminence of the event. On the other hand, as I looked through the attachments to the complaint, it looked like the plaintiff has only had since about the 6th since she apparently got word that she couldn't do what she wanted to do. So, given that, we set this on short notice, but I do appreciate the parties responding so quickly.

I have read the, as I say, the verified complaint and its attachments, the motion filed by the plaintiff, as well as the memorandum that they filed, and I've also read a memorandum filed by the defendant, together with I believe all the cases both of you have cited, although I will tell you I haven't had hours and hours and hours to read them all. So that is where I [4] stand.

Let me hear from both parties as to what they would like to do in terms of this hearing, whether there are facts in dispute, and some idea of the time you would like. Since we have somebody on the phone, you need to make sure you are using a mike, and I don't know if you—if you need to come up closer because of this speaker, you are welcome to do it, both of you, if you would like to.

MR. MARSHALL: Let me try from the podium, Your Honor. Can the folks on the phone hear me okay?

MS. MALVERN: Not very well.

THE COURT: Well, the podium is somewhat tethered because it's attached into the the ground.

MR. MARSHALL: It may be easier for them to hear if I am sitting close to the mike.

THE COURT: Is that any better? I am a little bit—

MR. MARSHALL: I can come up to the front bench probably and be heard fairly well if I speak up.

THE COURT: That would be fine. And if your client would like to come too she can, it she would like, whatever you want to do,

MR. MARSHALL: Okay, T.A., you want to come up or at least move a little bit closer? How about from [5] this vantage point?

MS. MALVERN: Fine.

MR. MARSHALL: Okay. I tend to have a loud voice. I apologize in advance to Your Honor. At this point I am prepared to make a brief overview of what we hope to accomplish here today, and we are also prepared to put on T.A. Wyner as a witness to set the factual history and then more detail about the nature of what is planned tomorrow in order to show the Court why this is a protected First Amendment activity and why the defendants should be restrained.

So, if that is acceptable, Your Honor, I will go ahead and make a few brief opening comments.

THE COURT: Let me see what the defendants would like to do first.

MR. MARSHALL: Okay.

THE COURT: What did y'all have in mind?

MS. MALVERN: Well, we are pretty on short notice with this and we don't know much of what is going on, but, as far as I can tell, there probably aren't any disputed facts, it's just a question of whether a nudity ban can be enforced in this case, that's all.

THE COURT: So you don't plan to call—

MS. MALVERN: Nobody is objecting to their protest other than the fact that they are going to do it [6] nude.

THE COURT: And ycu don't then plan to call witnesses at this hearing?

MS. MALVERN: I doubt it unless somebody says something that somebody tells me that's, around this table, is incorrect.

THE COURT. Some of the people with you are, in addition to having lawyers, you have your program people?

MS. MALVERN: A couple of people.

THE COURT: Okay.

MS. MALVERN: One person really.

THE COURT: So from your standpoint you think it's going to be legal argument unless the plaintiff says something y'all think is wrong; is that right?

MS. MALVERN: Correct.

THE COURT: Okay.

MS. MALVERN: I am not aware of any factual disputes.

THE COURT: Okay. Why don't we then proceed. And how long do both sides want? How long do you think you want, Mr. Marshal?

MR. MARSHALL: I believe that with the witness and a brief introduction and argument afterward I think we can easily be done in 45 minutes to an hour, if that.

[7] MS. MALVERN: You have to speak up a little, sorry.

MR. MARSHALL: I apologize, I believe Ms. Wyner would take approximately 30 to 45 minutes and then, with 15 minutes of argument, plaintiffs would need about an hour total.

MS. MALVERN: Is there any way we could find out whether there really are some disputed facts?

MR. MARSHALL; If I could, Your Honor, I, part of the problem here is this is not written on a clean slate, and I will just proffer Ms. Wyner's testimony that, although her actions began prior to 1990, in 1990 she was arrested for disorderly conduct at the MacArthur Beach State Park when—

THE COURT: If you want to sit in that witness chair, so at least you have a place to sit, feel free to do that.

MR. MARSHALL: Thank you, Your Honor.

MS. MALVERN: I guess we might as well let your witness testify.

THE COURT: Well, he's going to give us a brief summary. She came up and was sitting in the witness chair because it's closer to the speakerphone, so she's already in the witness chair if it's necessary.

MR. MARSHALL; The basis of that arrest was [8] that Ms. Wyner had held an image of the Bill of Rights that covered her breasts and her pubic area and had two stars on each of her buttocks and she was arrested under the nudity regulation in the park. Those charges were ultimately dismissed.

In 1991, the very next year, Ms. Wyner put on a theatrical production at the park that involved a history of the park and what they believed to be a historically clothing optional section of that park. During that play there were moments of innocent nonerotic nudity that appeared in the the play and she was arrested for indecent exposure. That charge was also dismissed.

Shortly after that Ms. Wyner and George Simon, the other plaintiff in this action who is in Hawaii and on his way here, filed suit in state court that ultimately resulted in a stipulation, Exhibit 1 to the verified complaint, wherein these defendants

stipulated that nudity combined with expressive conduct was protected under the First Amendment and permitted, if you will, the play to go on in 1996.

Ms. Wyner would testify that in 1996 the play did go on without any screens, without any putting off of separating themselves from the rest of the park, that there were moments of innocent nonerotic nudity, there [9] were no problems, there were no arrests.

In 1999 the play was put on again but this time the defendants erected a screen to separate where the play was being done from the rest of the public there. In the year 2000 the department distributed signs around the park saying that there would be a play that there would he nudity involved, but the courts had determined that this was protected activity and that if you were offended by the nudity this is where the play was going to be and you could stay out.

Then starting around, again around 2000 through 2001, there was very, various correspondence between Ms. Wyner and the department in which the department again began to threaten the arrest of individuals for violation of the nudity regulation in the park. And we would show that the nudity regulation is related to bathing and swimming in the park.

Finally, this year she, as she always has done, notified the defendant in advance of expressive activity to take place in the park that would include innocent nonerotic nudity and this year it was going to be in conjunction with an anti-war demonstration that would include the image of a peace symbol composed of nude bodies. She attempted to arrange with the park in advance to make sure that it was a convenient time, a [10] convenient place and would not interfere with the park.

In short, we believe her testimony would show that there have been continual displays of innocent nonerotic nudity at MacArthur Beach State Park, that it has caused no material

disruption or disruption at all to the efficient operation of the park, with the exception of actions by the defendants in threatening to arrest and in chilling the participation of the audience in the production.

And then she would also testify about the significance of the, not only the artistic but the anti-war message involved in the peace symbol composed of nude bodies, that this, in fact, this method of demonstration has become the image of anti-war protests in this era of individuals protesting against the impending war with Iraq and seeking peace in a noncombative way, that the image of the nude bodies conveyed a sense of vulnerability of those who are participating, and that the participants are clearly unarmed in the action that they are doing because there's nothing that is hidden from the view of the public.

This would, in essence, be the testimony that Ms. Wyner would put on. There are additional documents to substantiate the threats of arrests in the past to [11] substantiate that we don't write on a clean slate in terms of what's about to occur tomorrow.

MS. MALVERN: That's it?

MR. MARSHALL: Yes, that would be her testimony fleshed out in more detail.

MS. MALVERN: I'm not sure that we have any conflicts with that. Do we dispute any of that? I mean we dispute that the only way to do a war protest is nude, but I don't think that's a matter of fact exactly, so I, you know, that is a matter of opinion. I don't think that, as far as I can tell, that she really needs to put on that testimony because I believe, as far as previous events are concerned, those are correct events. That's my understanding.

MR. MARSHALL: Okay. And so long as the state defendants are agreeing that there have been continued threats of potential arrests, we have no problem with that.

MS. MALVERN: I don't know how continued they were. There were some letters saying that the park service intended to enforce the nudity ban. I believe that's correct.

MR. MARSHALL: And that it could subject them to arrest for violation of that ban?

MS. MALVERN: Violation of a park rule can do [12] that.

MR. MARSHALL: Okay.

THE COURT: I think I would like to hear from her at least briefly on some of what—I want to understand what has gone on in the past and have a little more detail about what exactly it is she plans to do. It wasn't clear to me entirely from the papers.

I also think I saw last night, when I got home I read my Palm Beach Post and I thought there was a brief mention, and it may be of something else, concerning this, that, and so I wanted to—I wasn't clear on how many people were going to be involved. The papers make it sound like only a few. The newspaper made it sound like—it wasn't clear to me from that.

MR. MARSHALL: Okay. I would be happy to go and have Ms. Wyner sworn in and try and flesh out some of that in as brief a fashion as possible.

THE COURT: Okay, thank you.

Ms. Malvern, you've got copies of all the materials they filed, correct? You have their claim and attachments and their memo?

MS. MALVERN: We do I believe, yes.

THE COURT: Okay.

TONY ANN WYNER, PLAINTIFF WITNESS, SWORN

DIRECT EXAMINATION

[13] BY MR. MARSHALL:

Q. Please state your name.
A. Tony Ann Wyner.
Q. Okay. And what do you normally go by?
A. T.A.
Q. Okay.

MS. MALVERN: Excuse me. I can't hear the witness.

THE WITNESS: Tony Ann Wyner. I usually go by T.A.

BY MR. MARSHALL:

Please tell the Court your background in terms of your professional or work responsibilities.

A. Well, I am 55 years old, I've been involved in—I have been a political activist since I was 14 years old involved in the anti-war program of the Vietnam era. I have been involved in production of theatrical productions of, street productions, all my life.

I currently produce an event for the City of Palm Beach Gardens as well as the City of Fort Pierce which is music, art and the encouragement of small scale farming. I have written several art and architecture tours for the City of Fort Pierce as well as the Audobon Society, the Conservation Alliance, the Jazz Society, those sorts of productions.

[14] Am I answering the question?

Q. Yes, I believe so.

Does all of the work that you do in terms of productions of an artistic and/or theatrical events involve nudity?

A. Not all, no.
Q. Okay, does some of them?

A. When the nudity is documented, you know, if nudity is part of the history that I am writing about, then nudity would be part of the production.

Q. Okay. Let's go to the John D. MacArthur Beach State Park, and, if you could, explain for the Court the first interaction you had in terms of doing anything at MacArthur Park.

A. In 1988 I was asked to organize what is considered to be a skinny-dippers' national holiday in July at MacArthur State Park because it has a history of being a clothing optional beach. When I went to organize that festival I was prohibited from distributing literature, flying a banner, circulating a petition and exhibiting artwork, which in that case was live body cast sculptures.

Those prohibitions resulted in a federal court case which ultimately went to the Eleventh Circuit, including the acknowledgment at the appeal level that MacArthur [15] Beach is a public forum and also challenging the codes that were used to restrict and prohibit expressive works, and—

MS. MALVERN: Could you speak up a little again.

THE WITNESS: What I said is that that court case resulted in the acknowledgment that MacArthur Beach is a public forum, it also acknowledged that the park regs that were used to prohibit or restrict that demonstration were at least used unconstitutionally.

BY MR. MARSHALL:

Q. Okay. That was 1988?

A. 1988. That was settled in—in 1995 was the final of that federal court case.

Q. Okay. What was the next incident in MacArthur State Park after that?

A. Well, again continuing, there's other things going on, we're having demonstrations, nothing is happening, however, in 1990 DEP changed the verbiage of some of their regs while I was still in federal court challenging them, so as a

protest to their changing the verbiage while the federal court case was ongoing I assembled, I organized a demonstration at MacArthur Beach State Park. I believe the report was five hundred people attended.

[16] And at that demonstration I invited people to speak against the regulations which included at that time a permit scheme, a content based permit scheme and permit reg. People were asked to speak, sing, play music. And then, in order to protest the, what we call the bathing suit code, which is still in effect, we asked people to show their bathing suits and ask the state park officials, who were assembled there, to sort of judge which of those bathing suits did or did not comply with the rule.

My own costume for that purpose was, not that I held up a Bill of Rights, the Bill of Rights was actually glued to my body covering all the parts the verbiage in the bathing suit code says to, and I was arrested for actually not the bathing suit code, that's what they said, I was actually arrested for disorderly conduct. I motioned Judge Evans to dismiss those charges, which he did, and then filed suit later on—

MS. MALVERN: Could you speak up again.

BY MR. MARSHALL:

Q. I'm sorry, what were you arrested for?

A. I was actually arrested for disorderly conduct. Those charges, that charge was dismissed, no, other charges were brought, and eventually I brought a civil suit as a result of those arrests.

[17] Q. Okay. That was 1990; is that correct?

A. That was 1990.

Q. Okay. What was the next incident at MacArthur State Park that you were involved in?

A. Again, let me just say that between the two incidents, if you want to talk about arrests, there were other demonstrations on the beach; for example, December 15th of 1990

there was a birthday celebration for the Bill of Rights on MacArthur Beach where there was some nudity, not on my own part, and there were no arrests even though they were in plain sight of rangers.

In 1991 I premiered the play that I wrote, "MacArthur, The Man, The Beach And The Skinny-Dippers." In that case I had several volunteers actually create a fabric screen, so to speak, around the stage and attempted to perform the play and myself and two cast members who were nude at the time were arrested for indecent exposure.

And also at the same time a member of the audience who was videotaping and fully clothed was also arrested for indecent exposure. Three of those—the three others besides myself had that charge nol-prossed. My own charge was dismissed.

And that also resulted in a civil court case which [18] we settled out of court and included the stipulation the name of my audience, because their First Amendment rights also were violated, and the name of George Simon, also in this case, and they also settled out of court with George Simon with the stipulation that, in essence, invited us back to the beach to perform the play in its entirety without incident, and we did so in 1996 with no arrests, with no screening and with the nudity.

Q. Ms. Wyner, the 1995 settlement that you are talking about, that was George Simon versus DeWald, that ended in a settlement that included the stipulation?

A. Correct.

Q. And that is what we appended as Exhibit 1 to the verified complaint?

A. I believe so.

Q. Okay. And now, that agreement did call for a screen, did it not?

A. The stipulation actually spoke about a screen.

Q. Okay. And was there a screen when the play was produced in 1996?

A. Not in '96.

Q. Were there any arrests?

A. Not at all.

Q. Was there any interference with anyone else at the park that you could tell?

[19] A. No.

Q. How many people were in attendance?

A. Over a hundred.

Q. Did the audience participate?

A. Yes.

Q. Could you explain to the Court what that participation was and how it fit into the play.

A. Well, since the play is a historic documentary, we actually, one of the characters is actually a time traveler and the time traveler asks people to go back in time when John D. MacArthur himself and his son Rod MacArthur was still living and the beach had its clothing optional tradition, and so in essence the extras, so to speak, in the audience, the audience becomes the extras, and the audience then portrays skinny-dippers of the time.

And so in that performance, in essence, most of the people on the beach were nude in the parts of the play where we depicted the era of the beach where it was hassle free to be clothing optional.

Q. When was the next, expressive activity or protest that you engaged in at MacArthur State Park after 1996?

A. I believe that, again things go on, in December the Bill of Rights, typically we will have something going on there, but I believe the next one is '98. In that [20] case I believe DEP again, because I let them know that we were coming to the beach, unknowing how many numbers there would be—

MS. MALVERN: Could you speak up again. I'm sorry.

THE WITNESS: I'm saying that again I did notify DEP because I am never certain how many people will be there. DEP at that time requested, actually offered to put up a screen, and since we had already had the stipulation and things were going so well, we decided to allow DEP to put up the screen and actually do the performance within the screen, which we did.

Again, there were no arrests; however, our conclusion after having done the play within the screen was that we had ghettoized the stage area and that the general public was in fear of coming beyond the so-called line in the sand and were in fear of coming beyond that line and the screen itself for fear of their being arrested, which people already knew about an audience member had been arrested, and so it actually chilled the performance, the screen, and we let DEP know that we could no longer use the screen. It took the performance out of the public forum.

THE COURT: By a screen, what are you talking about? I thought the stipulation provided for if DEP [21] wanted to, to put a screen around the thing so that if people didn't want to see it they weren't part of it but if they wanted to go around the screen they could see the play. Is that the kind of screen or are you talking about some sort of screen like you had in the first one which was some sort of gauzy screen, as I understood it?

THE WITNESS: They were fairly similar actually. The one that we used in '91 when the first arrest of the play occurred was fabric, and ours was actually probably a little mare opaque than theirs, but the one that they installed was somewhat gauzy fabric. And also recall, even though the stipulation did speak to the screen, we did not erect a screen for the '96 performance post stipulation.

THE COURT: Well, didn't the stipulation say that DEP could do the screen if they wanted to? I thought that's what it

said as opposed to requiring you to do it. I don't have it before me.

MR. MARSHALL: Let me look real quickly, Your Honor.

THE COURT: I remember it said DEP could use signs if it wanted and there was something about the screen.

(Pause)

MR. MARSHALL: Okay, it does say, Your Honor. [22] this is the second page of Exhibit 1, paragraph 5, "Plaintiff and his representative shall arrange for placement of a bolt of cloth in a semi-circle around the area where the play will be performed."

THE COURT: And that, in terms of the signs, it says DEP can use the signs?

MR. MARSHALL: Well, on the signs it says, "Plaintiff and his representatives may at their sole discretion erect two signs no larger than four square feet advising beach-goers that a play will be performed within the cloth enclosed theater which includes nudity."

So that the stipulation did cover the cloth to be done by the plaintiff and the plaintiffs could put up signs at their discretion.

THE COURT: Okay, thank you.

BY MR. MARSHALL:

Q. Let's go—that was 1999; is that correct?

A. I think that was '98.

Q. Okay. After 1998 when is the next year that you recall being in the park?

A. Well, I get a little confused myself, but I think—

MS. MALVERN: Louder again, please.

THE WITNESS: I'm sorry. I was just saying I [23] get a little confused myself. I believe in '99—

BY MR. MARSHALL:

Q. Well, if I could help here, 2000 is what I am going to get to in terms of park officials putting up signs.

A. Right.

Q. But the year prior, as you recall, was the play performed again with the department putting up a screen?

A. I believe the department only put up a screen once.

Q. Okay. So that would have been either 1999 or 1998?

A. Right.

Q. Okay. Now, I understand from your testimony that you and the participants were unhappy with the screen but was there any effect that you could tell upon the operation of the park as a result of the play and periods of nudity?

A. No, because, as is our tradition, we ask for reports of rangers of the day, and there were no incidents, including the numbers of people or parking or anything else.

Q. Do you take any steps in advance of productions you put on to inform other people in the vicinity that there may be nudity?

A. Absolutely. The prelude to every performance, whether it's a demonstration or a theatrical performance, is to make sure that everyone, first of [24] all, we use ushers and ask people as they enter the beach, because this is a huge park; as they enter the beach the ushers are instructed to let every individual that comes off the boardwalk know what is going on, know that there is going to be nudity, so that they can avert their eyes, they can go to a different part of the beach, or we will move.

In fact, what we normally do is ask anyone within earshot if we are even bothering them by our presence or our sound, even though we don't use a sound system, and then proceed if there are no objections.

Q. Ms. Wyner, could you for the Court describe the layout of MacArthur Beach State Park and where you ordinarily perform in relation to that layout?

A. Well, the park is huge and there is a long, I don't even know how long the boardwalk is from the nature center parking lot, rangers' facilities, etcetera, to the actual beach. The beach itself is 1.8 miles long. We typically go at least a quarter of a mile north again from the exiting, from the bottom of the boardwalk, so of course we are not in the path or in the way of anyone going on to or coming off of the boardwalk.

Q. Now, Ms. Wyner, in 2000 do you recall the department placing up posters around the park?

A. Yes. Actually, I think we included those copies [25] and those are direct copies that are actually the size.

Q. Okay. I am going to hand you what we have marked as Exhibit 5. I have an extra copy for the Court and for the benefit of those on the phone, let me—let me first ask Ms. Wyner if you will verify is this a poster that was distributed by park officials?

A. Actually, it was posted, and yes, it is.

MR. MARSHALL: It says, "Today John D. MacArthur Beach State Park will be the location of a play entitled "MacArthur, The Man, The Beach And The Skinny-dippers." As part of this production, nudity will he involved. The courts have determined that this activity is a protected expression under the First Amendment of the U.S. Constitution.

"The Florida Division of Recreation and Parks recognizes the constitutionality of this activity. The division also recognizes that this activity is not normally associated with traditional recreational use of our parks and that some of our visitors may wish to enjoy the beach and facilities of the park without the benefit of this production.

"As such, the park, in conjunction with the Florida Park Patrol, will provide screening, signage and personnel to advise all visitors of the exact location of this theatrical production."

[26] I would like to move for admission of Exhibit 5.

THE COURT: Do you have any objection?

MS. MALVERN: Judge, other than the fact we haven't seen a copy of it, that seems to be the gist of what was on those signs, but without seeing one it's a little hard to waive any objection we might have to it.

THE COURT: Okay. Well, I will tell you he read it accurately and it's, just as they have it here, two pieces of white paper with those words printed on it. So I am going to admit 5.

THE WITNESS: It actually was one full, one whole piece. It has been cut I guess for the file or something.

MR. MARSHALL: Okay,

BY MR. MARSHALL:

Q. Was there any interruption because of your production in the year 2000?

A. There has never been any disruption, any interruption, with anything else going on in the park.

Q. What's happened after the year 2000 in terms of—

THE COURT: Let me ask you, in 2000 was there a screen and who put it up?

THE WITNESS: There was no screen.

MS. MALVERN: We couldn't hear that answer.

[27] THE WITNESS: There was no screen in 2000.

THE COURT: She said there was no screen in 2000.

BY MR. MARSHALL: How about--

MS. MALVERN: Was there nudity? I'm sorry, Your Honor. Was there nudity in this one in 2000?

(Pause).

THE COURT: She's looking for her reading glasses right now.

THE WITNESS: If you could read this, this is a newspaper report, and I'm confused.

MR. MARSHALL: Okay. Ms. Wyner has handed me an article out of the Palm Beach Post with the date of February 21st, 2000, that I assume would refresh her memory without—well, let me just say what it represents in the newspaper article and then I will ask you if this is your recollection.

"The play was performed by activists in T-shirts and jeans. Park Manager Smythe had asked the group to perform behind a sand colored screen but Wyner refused, saying the screen had a chilling effect."

BY MR. MARSHALL:

Q. Does that refresh your recollection?

A. Yes. Okay, so what happened in that case is that DEP did put up a screen. Because we thought we had [28] already clarified that the screen had a chilling effect, we chose to perform outside the screen. But again when I start the plays I always let, of course, these are not actors, these are people that show up, they are given scripts as they show up as volunteers, so along with that they are told what the condition and status is of DEP.

In this case, now that I look at this, I also have a post performance report, which is something that I do personally, and it does refresh my memory that we chose to go outside the screen, we did the performance, and then it was up to the individual performer to choose to do their part in the typical fashion when it required nudity or not.

In some cases, I can recall in one particular case the woman who portrayed Belinda Maguire used a prosthetic breast over her own.

Does that answer it?

Q. Well, could you explain what, who is Belinda Maguire in the context of the play?

A. Belinda Maguire is a woman that was convicted and whose conviction was upheld for jogging top-free on MacArthur Beach in the early '80s.

Q. Okay. And so this person is part of the play?

A. That was part of the history, part of the play.

[29] Q. Okay. Following 2001, I mean 2000, what happened in terms of your putting on a play or other theatrical productions in MacArthur Park?

A. The threats continued, again I continued to let the park know on the annual event, which is always in February when we perform the historic play, and again there were threats of arrests.

I believe in the case of 2001 we did go to the beach and—let me just make sure of what I am saying here. No, I'm sorry, 2001 was a cancelled performance because I have a list of people and, that came from out of town, and their expenses and not having been able to see the play.

Q. Okay.

A. And that was cancelled as a result of the threats to arrest.

Q. I'd like to--

MS. MALVERN: As a result of what?

THE WITNESS: The threats to arrest.

MR. MARSHALL: Okay. Again I'm going to hand Ms. Wyner a document I'm labeling Exhibit 6 that purports to be a letter dated January 23rd, 2001. to T.A. Wyner from Assistant General Counsel Mera P. Levy.

MS. MALVERN: Judge, we're going to object again. Counsel hasn't shown us any of these exhibits in [30] advance of the hearing so we could review them or anything

of the like. We are simply having them read to us over the telephone. And I understand that he might be reading them accurately, but they could be taken out of context with other letters that we don't have available to us at this moment at this hearing.

THE COURT: Okay. Well, I understand. For purposes of this hearing I'm going to overrule the objection because of the time constraints of a preliminary injunction or temporary restraining order. I will assure you when he finishes whether he's read it accurately so that at least you will know it says what it says it does. I also note it is a Department of Environmental Protection letter.

Go ahead.

MR. MARSHALL: Okay.

As I said, this is addressed to T.A. Wyner.

It says, "Dear Ms. Wyner: Ms. Brantley has asked me to respond to your letter dated January 2nd, 2001, in which you have informed the department of your intent to perform the play "MacArthur, The Man, The Beach And The Skinny-Dippers" at John D. MacArthur Beach State Park on February 18th, 2001. You stated that the play includes several scenes in which the actors will be nude. You then asked whether the department believes it has any [31] basis for restricting your plan.

"As has always been the case, the department, specifically the Division of Recreation and Parks, welcomes free speech activities in all state parks. However, the division has several significant government interests to protect which require the imposition of certain narrowly tailored time, place and manner restrictions.

"One of these restrictions is that all free speech activities be conducted in compliance with Rule 62(d)2.14, Subsection 7(b), FAC, which states that, quote, in every area of a park,

including bathing areas, no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breasts below the top of the nipple with less than a fully opaque covering, end quote.

"The division hopes you and your fellow participants will respect and comply with this and all other applicable park rules. Please coordinate your free speech activity with the park manager as provided for in Rule 62(d) 2.014, Subsection 18, and please refrain from appearing nude in violation of Rule 62(d)2.014, Subsection 7(b).

"Pursuant to Section 258.007, Subsection 2, Florida Statutes, the violation of any park rule is a [32] misdemeanor which can result in an arrest. Thank you for your cooperation. If you have any further questions or concerns please feel free to contact me at the above address or phone number."

BY MR. MARSHALL:

Q. Now, Ms. Wyner, did the—was this the same play that you proposed in 2001 that had actually been performed in prior years?

A. Yes.

Q. Did the play get performed in 2001?

A. No. And I believe there's a follow-up letter from the same attorney from DEP. When they threatened to arrest the cast of my play I decided that I would try and revert to the old demonstration, which was the costume of the Bill of Rights.

I then let DEP know that I was going to retreat from the performance of the play, spare my cast being arrested, and go back to the costume of 1990, which was the Bill of Rights, and I believe their response letter to that was that it too would be in violation. Having already charged me with—

MS. MALVERN: Objection, hearsay.

THE WITNESS: Well, there's a letter that—

BY MR. MARSHALL:

Q. But is that your recollection of the position of [33] the department as given to you?

A. Yes.

Q. Okay. Was there any performance in 2001?

A. I believe not.

Q. Okay. Did—

THE COURT: Why would a letter from DEP be hearsay?

MS. MALVERN: Well, that's a good question I guess. I thought she didn't have the letter. I should have said best evidence.

THE COURT: Okay.

THE WITNESS: There is a second letter.

MR. MARSHALL: For the sake of—I didn't think that this letter was necessary, but it's come up, I would go ahead and put it in, call it Exhibit 7.

MS. MALVERN: So we do have the letter?

MR. MARSHALL: I do have the letter. However, I will disclose that there is handwriting on it that I believe is Ms. Wyner's. I would simply at this point ask the Court to ignore the writing because it's not part of the letter and is not from the department.

MS. GUARD: Judge, we would just state our objection, understanding your ruling.

THE COURT: Okay, the objection is overruled.

The letter says, "Dear Ms. Wyner: In your [34] letter dated February Seventh, 2001, you describe a costume you intend to wear on February 18th, 2001 at MacArthur Beach State Park and ask whether the department believes this costume would be in violation of Rule 62(d)-2.104(7)(b), Florida

Administrative Code, or would be cause for a disorderly conduct charge.

"Without having seen the exact costume you will wear, the department is not prepared to offer an opinion as to whether it conforms with Rule 62(d)-2.104(7)(b) or whether it would be grounds for a charge of disorderly conduct.

"Sincerely, Mera P. Levy, assistant general counsel."

MS. MALVERN: It mischaracterizes the testimony then.

BY MR. MARSHALL:

Q. Well, is this the letter you received from the department?

A. Yes. Actually, I think there might be another letter.

Q. Okay.

A. But okay.

Q. Counsel has not seen another letter. But the question I would ask, Ms. Wyner, is, given whatever exchange you had with the department in 2001, what was [35] your decision about going forward with the performance in MacArthur Beach State Park?

A. Actually, the clock ran out. If you check the date on this, again I typically let DEP know the day after New Year's Day, these letters go back and forth, phone calls in between, etcetera, and the clock merely ran out.

Q. Why do you notify the department in advance?

A. In an attempt to avoid arrest.

Q. Why is that? Why do you want to avoid arrest for—

A. Because I am somewhat responsible for giving information to people who will be on the beach. As I said, an audience member has already been arrested. So I have to let these people know. And what this has done continually is diminish the audience and their own First Amendment rights in not an unfettered marketplace.

Q. How about 2002, was there any performance?

A. No, there was no performance in 2002.

Q. Was there an attempt to perform?

A. No. At that time I think we knew that any remedy would have to come from court.

Q. Let's go to this year now. Could you tell the Court your steps that you took in terms of—well, first explain what it is that you intend to do tomorrow [36] if permitted.

A. Tomorrow my intention is to direct individuals in a political image of, an anti-war image, by creating a peace sign, the symbol of peace, created by nude bodies.

Q. Could you explain to the Court what this protest is that is intended tomorrow?

A. It's directed at the potential war in Iraq.

MS. MALVERN: I'm sorry, a little louder,

THE WITNESS: It's intended to be a protest against the potential war in Iraq.

BY MR. MARSHALL:

Q. What steps did you take in 2003 to work with the department in terms of the planned demonstration?

A. Once again, I phoned the park soon after the first of the year, as I, and learned that there was a new park manager who just happened to be on vacation. The first call I made actually was to the nature center to find out if there were any weddings, large organizations, tours or whatever scheduled for the day that we intended the peace image.

Q. Were there?

A. No.

Q. What else did you do?

A. Then I phoned the park manager who ultimately did return my call and we spoke by phone, Mr. Coullitte, who [37] I had not met yet, and he and I spoke and I let him know what my intentions were, and I asked him what he was going to do and he said that he would speak to his supervisors. He then called to let me know that a letter had come from

Tallahassee, oh, that he, the supervisors requested that he ask me to put my plans in writing, which I did.

Q. Okay. How did you put those plans in writing?

A. By e-mail I believe.

Q. And would that be Exhibit 2 attached to the verified complaint?

A. Yes.

MR. MARSHALL: Your Honor, I might ask, having moved for admission of these other exhibits, is it sufficient that these were attached to the verified complaint or should I make a formal motion to admit them into evidence?

THE COURT: Why don't you go ahead and make the motion so we can find out—

MR. MARSHALL: Okay. I would move to admit Plaintiff's Exhibit 2 attached to the verified complaint.

THE COURT: Which is the e-mail?

MR. MARSHALL: Which is the e-mail from T.A. Wyner to Terence Coullitte.

[38] THE COURT: Any objection to that?

MS. MALVERN: No objection.

THE COURT: All right, Exhibit 2 to the complaint is admitted.

MR. MARSHALL: I would also back up and move to admit Exhibit 1, the stipulation for settlement in Simon versus DeWald entered into by plaintiffs and defendants.

MS. GUARD: Judge, we object to the extent that it bears handwritten markings. If the plaintiff has a clean copy or if it's amenable to essentially ignoring those or, the handwritten marks on there, we don't have any objection.

MR. MARSHALL: Sure. I apologize to the Court for not getting rid of those handwritten marks, but they are irrelevant to the document itself.

THE COURT: All right. The stipulation is admitted minus the handwritten remarks.

MR. MARSHALL: Okay.

BY MR. MARSHALL:

Q. Now, Exhibit 2 then, the e-mail, explained to the department what it was you intended to do?

A. Correct.

Q. Did you receive a response from Mr. Coullitte?

A. Yes, I did.

[39] Q. Okay. And let me show you Exhibit 3 to the verified complaint and ask you if this is the response you received from Mr. Coullitte?

A. Yes.

MR. MARSHALL: I move for the admission of Exhibit 3, Your Honor.

MS. MALVERN: No objection.

THE COURT: All right, 3 is admitted.

BY MR. MARSHALL:

Q. When did you next hear from Mr. Coullitte?

A. Are you talking about after his e-mail?

Q. Yes. Well, the e-mail itself didn't resolve the question, did it, in your mind?

A. I think that was the only e-mail exchanged. I think there was just one e-mail from me at his request that I put it in writing and then an e-mail from him which I had also asked him to copy to my attorney, Jim Green, at that time, and I think that was the extent of our correspondence.

Q. Okay. Let me just ask you to take a brief moment to read the Exhibit Number 3, the response from Mr. Coullitte, and then I will have a question for you.

A. You want me to read this out loud?

Q. No, to yourself, please.

A. Okay, from Mr. Coullitte, okay, yeah, this was the [40] first response from my original letter.

Q. What was your impression then of your ability to put on the display and protest that you sent to him at that time?

A. To go ahead and let people know to come on, it's happening.

Q. Did you hear anything further from Mr. Coullitte?

A. Yes.

Q. And when did you next hear from him?

A. I don't have the date, but again by e-mail, this time referencing the, for lack of a better term, bathing suit code being charged if there was any nudity involved in the demonstration.

Q. Let me show you Plaintiff's Exhibit 4 attached to the verified complaint and ask you to take a moment to look at that document.

A. Okay.

Q. Now, is your testimony that there was another e-mail prior to this document?

A. Yes, the one that says, "Thank you, I think everything is working out," whatever.

Q. Okay. Which was Exhibit 3?

A. Correct.

Q. But was there any other e-mails between Exhibit 3 and Exhibit 4?

[41] A. I think there might have been just an e-mail of thank you between he and I, he thanked me, I thanked him, whatever.

Q. Okay. So your testimony about referencing the bathing suit code was actually to Exhibit 4; is that correct?

A. Correct.

MR. MARSHALL: I will move for admission of Plaintiff's Exhibit 4, Your Honor.

MS. MALVERN: No objection.

THE COURT: Exhibit 4 is admitted.

BY MR. MARSHALL:

Q. Ms. Wyner, what is your understanding, given Exhibit 4, as to your ability to put on the planned protest and display tomorrow?

A. That this is total disregard for the expressive nature of nudity and that their bathing suit code will be used against any demonstrators, despite their intent for expression, and they would be charged with it.

Q. Could you explain to the Court how nudity fits into the expression of anti-war sentiments through the formation of a peace symbol?

A. If I could just back up—

Q. Certainly.

A. —again, one of my first political appearances was [42] the anti-war movement of the Vietnam era, and an the day that Kent happened and people were killed in the anti-war move-ment at Kent University there was a large conference of people organizing the moratorium in 1970 and my suggestion at the time, because when Kent happened the, supposedly before people were shot, the National Guard thought they heard shots fired by students or thought that students had firecrackers or whatever, so it was my suggestion for the moratorium nation-wide that the moratorium be nude, and the reason for that would have been, my argument was that clearly no one would be armed and that the nudity in itself was an image of vulnerability and that perhaps it would not, it would be a safer way to do the moratorium. That didn't happen.

Years later now we get to this era, the Iraq war, and I am not the originator of the idea, all over the world people have been using this, people who are not naturalists have been using nudity to form peace signs from Australia, Marin County, California, British Columbia, Gainseville, it's been happening all over the world, and we are merely taking the

lead from what has become the image of the anti-war protest era.

Q. What does the image of nude bodies convey that the absence of nude bodies would not convey?

[43] A. I believe it is the vulnerability and the absence of weapons or arms.

MR. MARSHALL: With that, Your Honor, I have no further questions of Ms. Wyner.

THE COURT: Let me ask, I thought that the article I saw talked about some coordination with another event possibly, and also is there some timing issue with respect to February 14th and other events, other protests of the sort?

THE WITNESS: Yes. Let me answer your first question first. There is an anti-war—there are anti-war rallies the following day in West Palm Beach and beyond.

THE COURT: By the following day, you mean the 15th?

THE WITNESS: Correct.

On the day itself, the idea of peace and love on Valentine's Day is a part of it. The period of February is always the, that traditional time. The reason that you see ill of these plays and other demonstrations happening in February of each year is that it is also the period we naturalists convene from all over the country in West Palm Beach for educational seminars, entertainment, athletic activities, etcetera.

THE COURT: And how many people do you expect?

[44] THE WITNESS: On the beach?

THE COURT: To participate in this performance, if you do it.

THE WITNESS: Well, I have to say that, considering the fact that DEP has spoken and the threats of arrest are out there, it could be very minimal again because audience mem-

bers, there has been an audience member arrested in one of my performances, and that has a chilling effect even on someone who would formerly just come to be an observer. So it's always very difficult for me to say how many people would be there.

I'm shocked and surprised when five hundred people show up and disappointed when hundreds of people are chilled to come, and so I really can't say.

THE COURT: Your complaint says something, maybe it was what you said in the paper, if that was you, "If there are a few people, we'll do it with a few, if there are more, we'll do it with more." I don't know how one person can do a peace symbol. Maybe you can, I don't know, but do you have some—I mean your play had a number of participants, I assume you had kind of a, at least a starting point of how many you would have, maybe you could add to it, what is the situation here?

THE WITNESS: I believe the math of it is that it might take seven, minimal seven, to actually complete [45] a peace sign.

MR. MARSHALL: If I might interject, Your Honor, did you notify the department as to your estimate of the number of people?

THE WITNESS: I, in my original e-mail I possibly did, but I probably gave some explanation as well as to I really cannot ever know how many people are going to—I have to say also that, because we have moved from the play to the anti-war demonstration, we have of course crossed over from merely naturalists to the anti-war movement.

And I do know that people involved, even some aides to legislators have told me they will be there. Whether or not they are actually going to be participants in creating the sign, the peace sign itself, I don't know.

MR. MARSHALL: Would it surprise you to have more than fifty people participating in the peace symbol, as you gave the department?

THE WITNESS: Again, because the word is out that this is going on, that I am in court trying to be able to go to the beach and actually have this happen, that is chilling to some people to even show up at that park on that day.

MR. MARSHALL: I apologize, Your Honor, I want [46] to ask very quickly about, who is George Simon?

THE WITNESS: George Simon is the, was the plaintiff for whom the stipulation was written, and is now involved again, because his intent was to be a part of this.

MR. MARSHALL: And is it your understanding that he is on his way or will be on his way from Hawaii?

THE WITNESS: From Maui, correct.

MR. MARSHALL: Your Honor, we did file and fax to the defendants a faxed affidavit from Mr. George Simon. I would offer it as Exhibit Numbr 8 and would substitute the original when he arrives.

MS. MALVERN: Judge, I object not only on relevance but also again it's not notarized or sworn to.

MR. MARSHALL: It is sworn to under—

MS. MALVERN: It has not been notarized, so we don't even know that he signed it.

MR. MARSHALL: If I am correct, 28 USC, 17, I want to say 38, I may be wrong about that, but he has declared under penalty of perjury—

MS. MALVERN: You are correct I will withdraw that objection.

MR. MASHALL: Okay.

THE COURT: I don't think I ever got that [47] one. At least I haven't seen it. It has just been handed to me. Maybe it came in later.

MR. MARSHALL: Yes. That was filed this morning.

MS. MALVERN: We are going to maintain the relevance objection, though, Judge.

THE COURT: Okay. Let me took [sic] at it.

MR. MARSHALL: And then I would explain the purpose.

THE COURT: Okay. In terms of relevance, I am going to overrule that objection. I am not sure it adds much other than that he was a party to the stipulation. Is there any any other reason why his affidavit adds much to this?

MR. MARSHALL: The only other reason, Your Honor, was your one question to Ms. Wyner about why February 14th, and I think she more than adequately explained the significance of that, but I would say that Mr. Simon is on his way from Hawaii for the performance and to, you know, I am not sure what time his flight is leaving, but if the injunction is not issued, then I am not sure that he would want to come.

THE COURT: Okay. I am not sure that carries any weight.

MR. MARSHALL: Yes, Your Honor.

[48] THE COURT: But I will overrule the relevance objection.

MR. MARSHALL: I have no further questions of Ms. Wyner.

THE COURT: All right. Ms. Malvern, do you have questions for Ms. Wyner?

MS. MALVERN: No, I believe we don't. Does anybody have any questions? Of course, the folks here are not the people that know the facts all that well, but I don't think anybody does.

THE COURT: Okay. I have one question. I don't know if this goes to the lawyers or to Ms. Wyner. The stipulation, and I don't have it, I don't have a copy right now, it didn't seem to have a date as to how long it was going to last or whether it was—it seemed to be really just to that play. I was—it seems unusual in terms of settling the case. Was there some understanding by the parties of how long the stipulation would remain in effect?

THE WITNESS: I understood it as an acknowledgment that they accepted that nudity—

MS. MALVERN: I'm sorry, a little louder.

THE WITNESS: I always understood it to be an acknowledgment of the Florida Supreme Court case which said that nudity combined with another form of [49] expression is protected as speech. And, in fact, since then the DEP general counsel has even acknowledged that in the press.

MR. MARSHALL: It was my understanding, Your Honor, granted that I was not a part of this prior litigation, Jim Green is co-counsel with me on this case, that the expectation was that this acknowledgment and stipulation would, if you will, smooth the way to resolve the kinds of problems that have gone on early on with the arrests.

Clearly, a part of the stipulation was simply for the production in 1996, but the acknowledgment was understood to be an admission, if you will, or an acknowledgment by the department that this was protected activity.

THE COURT: Do you have a copy of it? I didn't read it as being limited to 1996. Perhaps that's a fair reading of it. Let me look at it.

MR. MARSHALL: Okay.

(Pause)

THE COURT: Okay, thank you.

Okay, if there are no questions for Ms. Wyner, we will proceed then to some argument.

MS. MALVERN: May I put on a little testimony about that stipulation?

[50] THE COURT: Okay. You want to do that now then?

MS. MALVERN: Might as well, yes.

THE COURT: All right.

PETER SCALCO, DEFENSE WITNESS, SWORN
DIRECT EXAMINATION

BY MS. MALVERN:

Q. Please state your occupation and your name.

A. My name is Peter Scalco. I am chief of operations for the Florida Park Service.

Q. Mr. Scalco, do you have any knowledge about the stipulation for settlement that was done in 1995?

A. The '95 one I really don't. I started being involved with these plays in 1997 as the assistant bureau chief in the district in which MacArthur Beach State Park is located, and we have taken this one exhibit at a time, exhibition at a time, because of the changing rules and regulations, as well as the administrative code changed, and it's our understanding at the park level that we would approach each play as an individual event.

Q. So you don't have any particular knowledge as to whether the park service understood the stipulation applied to that play?

A. No, ma'am.

[51] MS. MALVERN: Never mind then. Okay.

MR. MARSHALL: I do have cross-examination, Your Honor.

MS. MALVERN: Okay.

CROSS-EXAMINATION

BY MR. MARSHALL:

Q. Mr. Scalco?

A, Right.

Q. If I understand you correctly, what you are saying is that the department now looks at each incident or thing to be produced in the park on a case-by-case basis; is that correct?

A. No. What we do is we look to guidance from our legal counsel on each case just to make sure that we are doing the right thing. We are not attorneys so, you know, we ask, if this particular event is taking place, do the rules that applied the last time still, are they still germane to the issue.

Q. Okay. So I understand it, you look at each of these individually, correct?

A. Yes.

Q. Okay. So that even though, for example, the same play would be produced say in 1997 as was produced in 1996, you would still make an independent look at whether it was acceptable under departmental [52] regulations?

A. Well, our question is more to the regulation as to the content of the play. If it's okay, the, we don't make the rules as we go along. If it's legal and allowable under the rules, then we are okay with it.

Q. Well, I understand. But wasn't nudity banned in 1995?

A. I don't know.

Q. Well, under the park's regulations, has the park's bathing and swimming regulations changed in the last few years?

A. Not that I am aware of.

Q. Okay. And so the same bathing and swimming regulation in effect today was actually in effect in 1995, was it not?

A. I have no reason to disagree with that.

Q. And so when the play went on in 1995 and included nudity a determination was made that it did not violate the park regulations, correct?

A. I'm not sure what determination was made.

Q. Well, the stipulation appears to permit a play to go on that involves nudity, correct?

MS. MALVERN: Objection as being asked about the legal effect of the stipulation. He's not a lawyer.

THE COURT: Well, I will overrule the [53] objection to the degree he has an opinion as a chief of operations for the park.

THE WITNESS: Right. Again, I will reiterate that, to my knowledge, you know, what we do is ask our legal counsel as to what rule is applied at any given time, and my understanding is that in '95, and I'm taking this from reading the stipulation and as my experience as a park official, that at that given time in '95, for some reason that I am not aware of, it was okay.

BY MR. MARSHALL:

Q. And so—but your testimony would be that if the same play were to be produced in MacArthur Park in any subsequent year it would still be up to park officials to scrutinize the play to determine whether or not it violated departmental regulations, correct?

A. No, we would ask the legal counsel if that were the case.

Q. Okay. But a determination is made, whoever makes it, on a case-by-case basis, right?

A. Are you speaking to the contents of the play or the legal controls?

Q. Well, certainly in order to get an opinion from your legal department would you not have to disclose to them that the play was to include periods of nudity?

[54] A. Could you repeat that question?

Q. Well, in order to make a determination whether a proposed play would be allowable by the park, you would have to determine what was contained in that play, would you not?

A. Yeah, that makes sense.

Q. Okay. And so you look at what the play is about and what's contained in it to get an opinion from your legal department whether it should be permitted under your regulations?

MR. COLLIER: Objection, mischaracterizes the testimony of the witness. He didn't say he would look at what the play was about.

MR. MARSHALL: Well, that's the question I asked the witness.

THE WITNESS: Well, to put it in simple terms, if we are given notice that a certain event is going to take place and in our opinion and judgment it could be or not be controversial or in conflict with our governing rules, we would ask our legal counsel for their opinion.

BY MR. MARSHALL:

Q. So if you think there may be some controversy you would ask for an opinion?

A. You're asking me?

[55] Q. Yes, sir.

A. Yes, I would personally.

Q. Are there any written standards that the department uses to determine when they are going to seek advice from counsel or just make the determination themselves?

A. Well, if there's—if nothing brings to mind that there might be something you have to ask someone, we don't, but our rules are constant. We just refer to them if something appears to be out of, you know, out of sync with our rules.

Q. Okay. Well, you are aware as chief of operations that there have been additional plays beyond 1996 in MacArthur Park that included periods of nudity, are you not?

A. Yes, I am. I have witnessed since '97 every one of them.

Q. Okay, you personally witnessed them?

A. Yes, sir.

Q. And those were not prohibited by park rules; is that correct?

A. Certain limitations as to time, place and manner were placed upon them, then we had a ruling that, following a legal action about the screening, and then at some other times the parties, for reasons that were not shared, decided not to be nude. So each one has [56] been a little bit different.

Q. But in each of those instances where nudity occurred it is correct to say that the department did not apply its bathing and swimming regulation, correct?

A. No. We did apply it.

Q. Well, oh, are you saying that the nudity did not violate the bathing and swimming regulation?

A. No. I'm saying that the context of the play fell within the parameters of our understanding of the legality of the action.

Q. And what was your understanding?

A. It was different every year.

Q. How did you make that determination when nudity was okay and when nudity was not okay?

A. Well, we, again I go back, we asked our legal counsel as to what rules were in place and we were told that if they go behind the screen and they lived up to the agreement then it's okay. If they don't go behind the screen and they don't live up to the agreement then it's not okay.

Q. Well, was that considered for this year, 2003?

A. I can't speak to that. That was between the legal counsel and the park manager. I wasn't part of that decision process other than to help facilitate the communication between the district and the operations [57] office.

Q. But at least in prior years when you were involved in presenting this question to the legal department you had to be in a position to describe what was going to be presented, correct?

A. I forwarded the description provided to me by Ms. Wyner and asked for counsel.

Q. And then the decision would be made upon the description provided to you by Ms. Wyner?

A. Correct, as long as that was in keeping, as long as the action was in keeping with the description provided.

Q. And so it is your testimony that some nudity is permitted within MacArthur Beach State Park, notwithstanding the bathing and swimming regulation, that is attempted to be applied tomorrow?

A. The nudity is not allowed ever except in the particular context of when the legal counsel says certain parameters have been agreed to.

Q. And that is made on a case-by-case basis?

A. No. The rule is consistent, it's whatever, you know, whatever rule—for instance, when 16(d) got changed to 62(d) we find out is this okay and we're told, yes, and as to time, manner and place you can do this.

Q. Okay. But—

[58] MS. GUARD: Your Honor, this is way, way beyond direct examination, and he's asking for legal opinions from the witness. He's already been told that legal counsel was the person who provided the opinions and not the witness and the witness is constantly being asked again for his opinion on how those decisions were made and he has been told that he referred them to counsel based on Ms. Wyner's description.

THE COURT: Well, I am going to overrule the objection. He said initially it was done on a case-by-case basis and so I think the cross-examination is appropriate. I didn't understand that it was just up to the lawyers. Is that the position you take?

THE WITNESS: Are you asking me, Your Honor?

THE COURT: Well, I was asking the lawyer who made the objection. It seemed like she said that was the position, that it's really just the decision made by the lawyers.

MS. GUARD: He said that he referred Ms. Wyner's descriptions to legal staff. That is what the witness has testified to. And if you want to ask the witness to clarify that for Your Honor, please ask.

THE WITNESS: Yes. To simplify, we get a description of the event, we get a letter that says we're planning on holding an event, it gives a date, [59] usually gives us a ballpark figure of people and the time, we make our legal counsel aware that the play is being scheduled and ask for guidance. That's what we do. And we do that every time.

BY MR. MARSHALL:

Q. And so you forward what is going to be presented to make a decision, that's your testimony?

A. Yes, sir.

Q. Okay. Well, isn't it correct that the regulations under which the park operates vest the time, place and manner restrictions in the park manager?

A. With, you know, with advice from legal counsel and division management.

Q. And so your testimony would be that in any case involving nudity it would have to be discussed with legal counsel?

A. Yes.

Q. And that could not be made by the park manager?

A. No.

MR. MARSHALL: No further questions, Your Honor.

MS. GUARD: I have just a few questions on redirect, Your Honor.

THE COURT: Okay.

[60] REDIRECT EXAMINATION

BY MS. GUARD:

Q. One, the first one, isn't it correct or wouldn't it be fair to state that in the past years we're talking about this specific

play that is discussed in this stipulated stipulation far settlement, the play that was described, you were here in the room, and it was described by Ms. Wyner?

A. Yes.

Q. Isn't that fair to say that's been going on in the past?

A. Yes, ma'am.

Q. And is it your understanding that this year something other than the play is going to go on?

A. Yes, ma'am.

MS. GUARD: Nothing further.

THE COURT: Well, what's different about it then?

THE WITNESS: We understand it's, well, we had to ask the questions about the screening, we had to ask the questions just about the context of the play.

THE COURT: What does that mean? They both had nudity, and you say this one is different, what's different about it?

THE WITNESS: Well, sometimes they had nudity, [61] sometimes they didn't, sometimes they were told they had to go behind the screen, sometimes it was five people, sometimes it was fifty people.

THE COURT: Any other issues? Numbers of people, whether the screen is there, anything else?

THE WITNESS: Well, the previous plays, you know, talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration.

THE COURT: Why is that significant?

THE WITNESS: Well, just that, from an operations standpoint, I mean the play is not significant, but the number of people could be different, so we have to just take that into consideration.

THE COURT: Okay. Any follow-up on the questions I asked from any of the lawyers?

MS. GUARD: No, Your Honor.

MR. MARSHALL: No, Your Honor.

THE COURT: Okay. Thank you, sir. Any other witnesses?

MR. MARSHALL: Not for plaintiff, Your Honor.

THE COURT: Ms. Malvern, anybody else?

MS. MALVERN: No, we don't have anybody else.

THE COURT: Okay. Why don't we take some [62] argument then on this issue.

MR. MARSHALL: Your Honor, I would submit that—

THE COURT: Do you all mind if we take a—I need to take about a five minute break. Is that all right with y'all?

MR. MARSHALL: Absolutely, Your Honor.

THE COURT: I'll leave the phone open, but I am going to step out for about five minutes. I'll be right back.

(Recess taken)

THE COURT: Okay, I'm back, and Ms. Malvern, are y'all there?

MS. MALVERN: Yes.

THE COURT: Okay, great.

MR. MARSHALL: Thank you, Your Honor.

Your Honor, I think that the chief of operations testimony has made quite clear that what is going on with this case in 2003 with T.A. Wyner is the epitome of content based decision making. He testified that the department looks at this on a case-by-case basis. They look at the context of what is being presented. He could not describe there being a difference between a play and a demonstration.

All we need do is compare plaintiff's [63] theatrical productions that have occurred several times in the park that contained innocent nonerotic nudity that were permitted and witnessed by park officials to now plaintiff's protest display of a peace symbol that will contain innocent nonerotic nudity and the department says, no, that is banned.

On what basis could they make that decision? They could only make it based upon the description of the larger message that was to be conveyed. And now it is government that wants to say what is acceptable in terms of the message that is to be conveyed by T.A. Wyner and others and the message that is to be heard by plaintiff Simon and others.

THE COURT: Well, you put a lot of weight on a couple of answers. Actually this play, it looks like it has been done twice with nudity and no arrest, one of those times with a screen and the plaintiff was unhappy with the screen, a third time there were posters and a screen but then it sounds like everybody was clothed, so the department, it sounds like, has been somewhat consistent in fighting it.

Then they entered into this stipulation, which I guess was an effort to settle the lawsuit, permitted it twice, and then it has not been permitted it looks like. Is that basically—in terms of the history, it [64] certainly is not equivocal to allowing of the play either, is it?

MR. MARSHALL: It is a grudging allowing of the play, that certainly is correct, but a grudingly allowing that was hard fought in the legal arena and ultimately settled to the satisfaction of plaintiffs. And now it is the department reneging upon the concession that was made in 1995 and what the courts have told us is expressive activity worthy of protection by the First Amendment.

This is not a mere display of nudity for gratuity effect. It has a message that is intertwined with what they're trying to say. Whether the department agrees with it or whether I agree

with it or not, it is a part of the message that is chosen by the speakers to be heard by the listeners.

THE COURT: Okay. Well, just for, let's lay aside for a moment the fact they have allowed it to a degree.

MR. MARSHALL: Okay.

THE COURT: And. assume that she's approaching them for the first time and they have this, apparently they have a ban on nudity, and then they have this First Amendment rule which doesn't speak one way or the other to nudity. What's your argument then?

[65] MR. MARSHALL: The argument is, Your Honor, that it is I think incorrect to say that there is a total ban on nudity in MacArthur Park because the provision that they are relying on, 7(b), makes clear that what they are banning is nudity in bathing and swimming, and that is consistent with the cases that have held that there's no protection of mere nudity in the park.

THE COURT: So if somebody wants to put on "Hair" at the park, what's the, how does the rule, how is the rule applied?

MR. MARSHALL: I think that the way this has to be read consistent with the First Amendment is that, although we quibble with the unfettered discretion in terms of time, place, manner restrictions, I would say this, that first if the decision is, in fact, content based, which we aver that it is, then strict scrutiny applies and this has to fall.

But let's set aside the content base for a second and talk about just "Hair" coming to the beach. I think that "Hair" falls within 18, that the department can put on reasonable time, place, manner restrictions, but they can't apply 7(b) as a manner restriction, because of the rule, if you will, of allowing First Amendment protected activity.

[66] Now, the department could as a reasonable manner restriction say we are going to post signs saying that this production is going on in the park and it involves nudity, and this is where it is, it's fifty yards ahead, if nudity offends you, don't go there. That is reasonable.

What they are trying to do is look in, and on a case-by-case basis they would have to look at "Hair" and see what is being conveyed as a message within "Hair" so they can determine on a case-by-case basis whether to allow nudity as a part of "Hair" or to reject it.

Because in the past they have made a determination that it can be allowed in MacArthur, the man play, they would have to make that same determination based on what's in "Hair".

THE COURT: Okay. So if they just say, well, you can do "Hair", we have no problem with "Hair", you just have to wear clothes, what's the problem with that?

MR. MARSHALL: Well, I think the problem with that is that "Hair", the nudity in "Hair" was inextricably intertwined with the purpose and the message of the play, and I think it was widely recognized during the time of its production that, in [67] fact, it was part of the performance, it was part of the message, it wasn't, it wasn't just merely people were putting on a play and then they took a break and everybody took their clothes off to stand nude in a park.

It was inextricably intertwined as part of the artistic expressive nature of the play to include the nudity, just as Ms. Wyner testified, the nudity, clearly innocent nonerotic nudity by people laying on the ground in the form of a peace sign, is not a frolic in the park, it's a part of a message that conveys more because of the lack of clothing.

THE COURT: Well, has that Thomas versus Chicago Park District case changed the analysis? It seems like they basically, some of the old arguments on the discretion that a park

manager can have may have gone by the wayside after that case, it would seem like.

As long as they apply it neutrally, you couldn't, under that you couldn't accept some nudity and not others or you couldn't have "Hair" and not Ms. Wyner's play, but it looks like you might be able to read that to say, well, the Chicago park, they may just decide the park is for people who want to go on picnics, if people want to go to a play they can go somewhere [68] else, and just prohibit nudity, or at least if they want to go a nude play, they can go somewhere else.

MR. MARSHALL: Well, I don't think that, and I will say I don't have Thomas at my fingertips right now, but it does strike me that the appropriate analysis is, one of the first, is what's the forum, and this is, as pronounced by the Eleventh Circuit, a traditional public forum in which, in order to restrict the speech, there needs to be compelling governmental interests with the means narrowly tailored to achieve that interest.

However, they can't apply content neutral time, place and manner restrictions. So, for example, they could have said to Ms. Wyner, I'm sorry, we have a large group of children coming at 11:30, can you do it at 9:00? I think that might be a reasonable time restriction.

It is a reasonable place restriction to say, You can't form this peace symbol at the entrance to the park where everyone is going to be coming through, please move it to the other areas where you have always had periods of nudity, and that would be a reasonable place restriction.

THE COURT: Are you challenging the rule facially or just as applied to these circumstances?

MR. MARSHALL: In this case we are challenging [69] both facially and applied to when it, in terms of allowing 7(b) to be a part of 18. In other words, the problem with 18 is,

certainly as applied in this case, is the unfettered discretion of the decision-maker, who the rule says is the park manager, to determine, without any kind of standards, without any kind of guidelines, a manner restriction that, in effect, is a total ban.

It eats up the whole role of the time, place, manner doctrine to completely ban nudity as a part of this display. And we do think that without articulable standards in place that on its face 18 does run afoul of constitutional mandates, but certainly as applied.

THE COURT: Okay, thank you.

Ms. Malvern, what is the department's position?

MS. MALVERN: well, our position is, as you say, the Rule 7(b) just bans nudity in every case. In that case it is content neutral. The differences that have occurred over the years has simply been different lawyers interpreting different Supreme Court opinions, not anything to do with the content but had only to do with trying to figure out what, where, if it's nudity, free expression, when is it free expression.

And I think our latest opinion is that, if it's a content neutral regulation like this one, in [70] every area of the park, including bathing areas, no individual shall expose the human male or female genitals, pubic area, the entire buttocks or female breasts below the top of the nipple with less than a fully opaque covering, and it's quite content neutral, quite specific, quite clear.

And I think they said they could perform in thongs if they want to, but it's—

THE COURT REPORTR: Perform in what?

THE COURT: Thongs.

MS. MALVERN: Yes.

THE COURT: The court reporter didn't catch your word.

MS. MALVERN; Thongs, you know, that kind of bathing suit, minimal bathing suits. It has been a while. But some kind of covering of the genital area is the park rule. And they have been informed by their lawyers that they can enforce that rule. And ever since 2001 they have intended to do so.

THE COURT: So "Hair", you wouldn't allow "Hair"?

MS. MALVERN: I don't believe they would in a public park. If it were in an auditorium, of course, that's different.

THE COURT: How about "Equiese"?

[71] MS. MALVERN: Same thing.

THE COURT: And the Nicole Kidman play, that wouldn't be permitted?

MS. MALVERN: Nothing that involves nudity would be permitted in the public park is my understanding unless it is in a theater where people could choose whether or not they wanted to go to it.

THE COURT: Well, in effect, you set that up when you used the screen, though, didn't you?

MS. MALVERN: That I guess was someone's understanding at some time. But I think the understanding now is that the whole park should be available to all people and not set aside for some people.

THE COURT: I don't want to put too much weight on a fellow who got put on the spot kind of at the last minute, but it sounds like it's essentially the lawyers deciding these cases rather than some discretion vested in the park manager.

The First Amendment or the First Amendment activities section talks about discretion in the park manager, but I certainly didn't hear very many criteria that the park manager uses other than to ask the lawyers what we think we can, what we can do. Isn't that—

MS. MALVERN: I think that's because, as I [72] say, the law has been changing so much that when it's the issue of nudity they just haven't been sure what they are allowed to do. The rule says no, but some early cases seem to indicate that, if it had an expressive aspect, it had to be allowed. More recent cases seem to have allowed there to be some content neutral regulations.

THE COURT: Well, there's none yet on "Hair" or anything like that. There's a couple on topless bars and whether they have to wear patsies or not. But I haven't seen any—hasn't the Supreme Court essentially said things like "Hair" are protected speech? You think that—what's your best case for saying you could keep that out of Grand Central Park or New York's park or the Chicago park or MacArthur Park?

MS. MALVERN: Well, I'm not sure on that one, Your Honor. I think you wouldn't keep it out entirely, but in that case you probably would try to find some area that, where people could choose whether or not they wanted to attend it.

THE COURT: Y'all didn't want to try to do that here? It would seem that was—your stipulating was an effort to do that with her other play. I guess if I were to compare the type, the importance of speech, and that's always a dangerous territory to get into, you [73] have to say that perhaps a war protest is more significant at least to more people than the "MacArthur, The Play, The Man, And Skinny-dippers."

MS. MALVERN: Yes, Your Honor, I wouldn't disagree with that.

THE COURT: Yet it seems like the only difference he was able to cite for the difference between this and that was this is an anti-war protest.

MS. MALVERN: I believe he said he expected more people to attend.

THE COURT: Well, I guess that is a—but you don't really have standards on people, numbers of people that the park could hold, do you?

MS. MALVERN: There's a carrying capacity I believe.

THE COURT: Why wouldn't the curtain or screen solve the problem of somebody would doesn't want to see it, see nudity? Seems like that would solve that problem, wouldn't it? Even under an O'Bryan test wouldn't you need to consider something like that?

MS. MALVERN: I'm conferring with the client here.

(Pause)

MS. MALVERN: That's an option. I don't think necessarily they would be opposed to that, although I [74] don't think under the law that they have to do that. There's the law that it doesn't have to be the least restrictive alternative. It seems like they have ample room for expression if they do their same demonstration just wearing some kind of minimal bathing suit.

The law that says under Ward versus Rock Against Racism that the rule must be narrowly tailored does not mean you must use the least restrictive means. And in that case we cited to you, Federal District case, the Kraft case, it actually applied it, it was very similar to this situation, and it said that it did not violate First Amendment rights to, and this was a demonstration, it was a demonstration against exploitation of women, and it said it didn't violate the First Amendment rights to say that they, if they wished to do this demonstration, they had to wear some clothes. That is Kraft versus Hodell, 683 Fed.Sup, 289, District Court, District of Massachusetts.

THE COURT: Are you able to, and there was no testimony on this, maybe you are not able to respond, there seemed to be a change in tone between Mr., the park manager's e-mail

to her, which I think would be number, the first e-mail, and the last one, he seemed to say he didn't see a problem and then later on seemed to say, seemed to see more of a problem. Is that—is [75] there anything you can add to just that, the text of those two e-mails?

MS. MALVERN: Well, the first one does say, "I will advise you as to any issues or concerns that have been brought to my attention," so I guess some issues or concerns were brought to his attention.

THE COURT: But then that means the park manager isn't the one deciding, doesn't it?

MS. MALVERN: It's a brand new park manager, so he needed to consult with people.

THE COURT: Okay, because he seemed to say, "I don't see a problem," and then went up the line and there was more of a problem. That at least adds the specter of a content motivated decision that now an anti-war protest is looked at differently than a, than what happened in the past.

MS. MALVERN: Well, as you mentioned, in the beginning of 2001 the play wasn't allowed to be performed either, and that wasn't an anti-war protest.

THE COURT: Okay. Any—

MR. MARSHALL: I would say that it's not correct to say that the play wasn't allowed to be performed. There was a choice on the part of the plaintiff not to do it.

MS. MALVERN: I thought the letter that you [76] read, January 23rd, 2001, from Mera Levy, said, "You can do the play but you have to wear clothes."

THE COURT: Yeah, it looks like they tightened up their approach to it in 2001 and went back to you have to wear clothes.

MR. MARSHALL: Part of the problem here is the state's interest that, at least they articulate to Ms. Wyner, is an interest of keeping the park open, and frankly that seems like a very confusing kind of interest here, because the park is there and the park only holds so many people, and Ms. Wyner goes the extra step of trying to ascertain a time when there aren't going to be other large groups around, and it seems to me, in the absence of some demonstration by the departmental officials that this kind of activity interferes with their ability to keep the park open, I don't see how a flat-out ban is tailored in any way to keeping the park open.

MS. MALVERN: Your Honor, this was exactly what was addressed in the Kraft case, a substantial interest in maintaining the attractiveness of the beach and ensuring that the beach is available to all users, protecting the public from the offense of nudity, that was upheld in Kraft.

MR. MARSHALL: But the real part of Kraft was [77] that it was a couple of women who were on the beach partly nude, there wasn't even an apparent demonstration that they said they were demonstrating on, that was sort of an after-the-fact kind of rationale for why they were doing it, and our own Florida courts have said that nudity for nudity's sake isn't protected, and we are not here to quibble with that.

THE COURT: Well, except then at least they had at least an argument that they were there for a demonstration. I mean, the problem with that is it almost gets, I think the department probably prefers, I don't know whether it's permissible or not, prefers a sharp line test; otherwise; I mean you might get into, you know, some local bar might decide to have topless dancing out at the park as well.

MS. MALVERN: Also, Your Honor, a sharp line test avoids content discrimination.

THE COURT: Well, except you haven't applied that. But, let me ask him a couple of questions first. I'm sorry, but so

what—what you just suggested to me, that the women's demonstration wasn't really a, wasn't really art I guess is almost what you said, doesn't that just invite the courts to try to make these distinctions and say, well, this anti-war protest with nudity is okay but a demonstration by two women in support of women is [78] not, or a topless dancer, because the courts have said that at least operates on the border of First Amendment protection, that that is not okay?

I mean, what test do you suggest that would allow either me or for the department—how does the department go about this?

MR. MARSHALL: I think the Court, the Supreme Court has already answered those questions, and I think the Court—

THE COURT: When?

MR. MARSHALL: I think they answered in looking at symbolic speech, okay, and in Spence v. Washington.

THE COURT: But how about this, these women they are talking about, I thought they were talking about the vulnerability of women and domestic violence, wasn't that what they wanted to protest about? That seems a little like what she's talking about.

MR. MARSHALL: Right. But I think what would have to happen, part of the test is is the public viewing the protest, seeing the symbolic speech for what it is, and if you are a member of the public and you are walking along the beach and there's a woman sunbathing in the nude, they see a woman that's sunbathing in the nude.

[79] Now, if there are a group of women there that have a placard saying, you know, "Women Are Oppressed," and, you know, and there's a clear kind of protest going on that conveys a message and nudity somehow fits into that, then it imbues the First Amendment protection on that.

THE COURT: Why can't they just say, "On state parks we think there may be other places for nudity involved in speech, but just not in state parks, state parks, we're going to hold them, they are public forums but they are limited in that we don't allow nudity, you can do whatever else you want," why is not that a defensible regulation?

MR, MARSHALL: Well, I think the problem is two-fold. Number one, written on the history that we have here, that's not what the department has done. Now, maybe the department intends to do that in the future, but to change the rules of the game when a peace protest comes along really does give the very strong impression that it is the message that is being conveyed that they don't like as opposed to some new-found desire to enforce an across-the-board ban.

And it would seem that, if the department wants to do that, they need to take a close look at their regulations and promulgate regulations that apply [80] outside of bathing and swimming, because the nudity is clearly in the context of the regulation.

THE COURT: Let me see that regulation on that aspect of it.

MR. MARSHALL: Okay.

MS. MALVERN: That's not really controlling.

THE COURT: Well, let me read it again first and I'll give you chance to respond to all of his arguments.

MS. MALVERN: The title up there is not controlling because the nudity is clearly in the context of the regulation. It's true the label says that, but that is not really controlling.

THE COURT: Okay, well, let me read this first.

MR. MARSHALL: I have the entire Chapter 26(d) and I have highlighted both Section 7 and Section 18.

(Pause)

THE COURT: Okay, thank you.

Go ahead, Ms. Malvern.

MS. MALVERN: I was just saying the title up there is not controlling. There are a lot of statutes that are poorly organized and rules that are poorly organized, and it very clearly says "in every area of the park, including bathing areas," not only bathing [81] areas, so it goes beyond the heading above it. I think it's quite clear.

THE COURT: Although you seem to take the position, as I read that, in an administrative, the hearing officer's opinion with respect to that fellow, was it the, the physicist, Manderson, or whatever his name was—

MR. MARSHALL: Fratson (phonetic).

THE COURT: Yeah. You seemed, the department took the position and the hearing officer seemed to say, kind of like the operations man said, that in deciding free speech activities basically you look at it on a case-by-case basis and consider all, you know, all the factors.

It seemed to be almost boundless discretion in terms of free speech activity, that they didn't, at least in that case, they didn't, you didn't seem to apply this bathing and swimming provision to ban any kind of nudity.

MS. MALVERN: Well, it wasn't a nudity—it wasn't nudity at stake, it was just a facial attack. The nudity provision was not an issue in that case.

THE COURT: Isn't that what he wanted to do? I thought that is what he was—wasn't he a naturalist who wanted to go there nude?

[82] MS. MALVERN: He may well have, but he abandoned that aspect of his case, then just tried to do a facial attack on it, rather than an applied attack.

THE COURT: So his complaint was just the amount of discretion?

MS. MALVERN: Right, as the Court decided, upheld the rule, because it wasn't a prior restraint in part.

THE COURT: Don't you have a concern about, I mean you can't just ignore the history, there has been a history where this has been permitted at times, although perhaps grudgingly, don't you worry about making your stand at a time when they are talking about an anti-war demonstration?

MS. MALVERN: Well, we made the stand for the first time in 2001, which had nothing to do with an anti-war demonstration. If it were true, that that were so, yeah, that would bother me a lot. But actually the stand was made over something else other than an anti-war demonstration.

THE COURT: You are talking about her thing before or is there some other—

MS. MALVERN: The letter from Mera Levy in 2001 was not referring to any anti-war demonstration.

THE COURT: Okay. So the one—again related [83] to Ms. Wyner?

MS. MALVERN: That's correct. But I believe it was that, I'm not sure, but I think it was the same play that she had been doing.

THE COURT: Do you know of any other history of nudity in state parks in terms of plays or expressive activities?

MS. MALVERN: We're all shaking our head around this table.

THE COURT: Which way?

MS. MALVERN: No. Sorry, no, Your Honor, we don't.

THE COURT: Well, do y'all want to—I have heard the arguments, read the cases, I want to take a couple of minutes and then I think I want to rule, so I can give you some guidance if you want me to.

The other opportunity would be for y'all to discuss it and try to resolve it. Do you want to try to do that? I'm going step out either way, I'll leave the phone open, I want to take a minute and look at some of what I have.

MS. MALVERN: I will confer with the client here.

THE COURT: Okay.

Why don't y'all confer, and then if you want [84] to talk with them, do it. I, frankly, have at least the beginnings of a draft opinion, so I will rule, but if y'all want to work it out, that is another route you could go.

Okay, I will give you about five minutes.

(Brief recess taken)

THE COURT: Okay, were y'all able to work anything out?

MS. MALVERN: No, Your Honor, we decided we would wait for your ruling.

THE COURT: Okay.

Well, I need to spend a little more time on a written order, but I know y'all are, I need to get it out, given the press of time on everybody, but I am going to grant the motion for preliminary injunction.

I won't repeat all the history, some of it will be in the written order, but it is apparent that on previous occasions Ms. Wyner's nude expression has been permitted and tolerated, although at different times grudingly, and that aspect of this case presents a very fact specific and worrisome concern.

I'm not prepared to rule at this point in the proceedings that this is a, that the decision was necessarily made with respect to content, but there are a number of aspects about it that are worrisome.

[85] First, the rule does appear to provide very broad, almost unlimited discretion, to the park manager in terms of

what type of free speech activity is allowed and which isn't. I note that the rule on its face at least seems to have the nudity ban relating to bathing activities and then it has a separate section on free speech activities.

The department has argued here that the ban is across-the-board and relates to free speech activities in every instance, and that may be the intention going forward, but that has not been the history, and some of the testimony is at least worrisome in that regard, that somehow an anti-war demonstration is different than a play, and I don't know that there was ever any—there isn't anything to reflect that the numbers would necessarily be different.

But, even if you apply an O'Bryan content neutral test, it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests, which would appear to be to protect beach-goers from being exposed to nudity, I presume beach-goers who aren't interested in nudity.

But they have done that in the past through the use of their signs and through use of the barrier [86] that the state used on one occasion, and so it seems to me that those avenues can well be explored in this case.

I want to make it clear in entering the injunction and directing that the defendants not prevent or interfere with her planned event that the injunction doesn't preclude the department, if it chooses, from using those kinds of signs they used in the past or some sort of barrier to warn people that might be at the park that if they, you know, that that is a, that there may be nudity involved in this anti-war protest.

But it is clear that her protest does involve expression, it's not nudity for nudity's sake, the nudity seems to be a significant part of the kind of statement she's attempting to make, and I think that, while at least to me it seems a bit strange to protest the war in that fashion, I credit her statements about

the vulnerability that it shows with respect to the war and the fact that there are no weapons.

And I note that there seems to be other protests of this type, so it does seem like this is expressive speech, and particularly given the history at this particular park, which I think began as a clothing optional park, and where she's been doing this for years, and I think that's well known to the community, [87] so I think that to ban it with respect to an anti-war protest is not in keeping with the First Amendment.

And so, for those reasons, I am going to enter an injunction. As I say, I will get it in writing so y'all will have the benefit of it.

It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide, issues on this quick a basis, but I do feel like this meets the test of the injunction. The courts have said that loss of First Amendment freedom for even minimal periods of time constitutes irreparable injury.

It seems to me that, if suppression of an activity is unconstitutional, then allowing that to happen would be adverse to the public interest. I don't see that there's any great injury done, threatened injury to the department. It looks like there were no certain events planned for the park during the time of this event. It doesn't seem that logistical difficulties would be significant. And, for all of those reasons, I'm going to enter the injunction.

As I say, I think the issues are somewhat difficult. I am satisfied with respect to this issue, but in terms of some of the others, exactly how this rule should be construed, whether a, and we may not even have to deal with that in this case, but whether an [88] across-the-board ban that was evenly applied and applied where you didn't have the history you have in this case, whether that would be acceptable, I'm not prepared to say certainly today.

What's the situation—what's the department's position with respect to some sort of bond or surety? Is there any need for that here?

MS. MALVERN: No, Your Honor.

THE COURT: Okay.

And again, as I say, I am going to wait—I will have this ready in about an hour, but if you want to somehow resolve this, I always think it's better for people to resolve their issues themselves, because communication helps in working these things out, as y'all certainly have in the past.

But if you want to do that, fine. Otherwise, this will be, I will try to get this filed by five o'clock. If you want to wait around you can. Do you want me to fax it up to y'all? Would that help you?

MS. GUARD: Yes, it would I think, Your Honor

THE COURT: Okay.

I hope your fax is on the paper you sent us. I think it is I think we still have the fax cover sheet. But we'll send it to that fax machine.

Okay, thank you all for your argument. I [89] appreciate it. And particularly doing it on short notice.

MS. MALVERN; Thank you, Your Honor.

MR. MARSHALL: Thank you very much for your time, Your Honor.

(Hearing concluded.)

CERTIFICATE

I, Roger Watford, Official Court Reporter, do hereby certify that the foregoing transcript is true and accurate to the best of my, knowledge, skill and ability.

Dated this 28th day of February, 2003

/s/ Roger Watford
Roger Watford

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed APR 14, 2003]

Case No. 03-80103-CIV-MIDDLEBROOKS

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

ORDER ON MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss Count II of the Complaint (DE 13), filed March 25, 2003. The Court has reviewed the record and is otherwise advised in the premises.

In response to the present motion, Plaintiffs have indicated that they dismiss Count II of the Complaint without prejudice (DE 16), filed April 10, 2003. Accordingly it is hereby,

ORDERED AND ADJUDGED that Count II of the Complaint alleging violation of the Florida Constitution is DISMISSED without prejudice. It is further ORDERED that Defendants' Motion to Dismiss (DE 13) is DENIED AS MOOT.

DONE AND ORDERED in Chambers in West Palm Beach, Florida this 14th day of April, 2003.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO. 03-80103-CIV
West Palm Beach, Florida
January 21, 2003 [sic]
1:15 o'clock, p.m.
Pages __ to __

T.A. WYNER & GEORGE SIMON,

vs.

DAVID B. STRUHS & TERRENCE COULLITTE,
Defendants.

TRANSCRIPT OF HEARING BEFORE THE
HONORABLE DONALD MIDDLEBROOKS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff:	James K. Green, Esq. Randall Marshall, Esq.
For The Defendant:	James Williams, Esq. Barbara Taggart, Esq. Christine Guard, Esq.
Court Reporter:	Roger Watford, RPR/CM. Official Court Reporter West Palm Beach, Florida

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[2] THE COURT: This is the case of Wyner versus Struhs and Coullitte. The case number is 03-80103. Let's start with appearances please.

MR. GREEN: James K. Green, cooperating attorney for the ACLU, West Palm Beach.

THE COURT: Good afternoon.

MR. MARSHALL: Randall Marshall with the American Civil Liberties Union of Florida.

MR. WILLIAMS: Jim Williams representing the defendants in the case with the firm of Williams, Langer & Cosby.

MS. TAGGART: Barbara Taggart.

MS. GUARD: Christine Guard with the Department of Environmental Protection.

THE COURT: Good afternoon.

Okay, well, this case is set for trial next week. There are some summary judgment motions pending, which I would be glad to hear further from you with respect to those.

I was curious, we had heard a rumor that you were close to resolving it. Have you thrown in the towell on that?

What is the problem?

MR. WILLIAMS: I haven't seen, Your Honor, that we are very close at this time to getting a [3] resolution. We had some discussions around the mediation a couple of months back. But I don't see that we're very close at this point.

THE COURT: Well, what's all this about? I was under the impression when it was initially filed and we granted the preliminary injunction that the primary motive for filing the suit was the protest or the performance the plaintiff wanted to make surrounding some sort of World Peace Day and she had the, they were doing this nude peace symbol, and that has come and gone. What's left? I thought that was the main focus of the case.

MR. WILLIAMS: It's my understanding, Your Honor, that the plaintiff has sought to make the injunction permanent so that she might have the ability to perform either similar demonstrations or plays or other performances out at this location at other times into the future, and we have had some indication, not confirmation, that that may be coming up in the reasonably near future again. So we don't have a situation where the issue has been resolved completely from our standpoint.

THE COURT: Well, Mr. Green, what—it was, I think we granted the injunction basically based on the as applied arguments, and the focus, I think really the [4] reason we granted it was there was a witness who testified basically the reason they didn't let her do it that time was, unlike the "MacArthur, The Man On The Beach", this was an anti-war protest, and that's what seemed to make the difference in the State's decision to not let her do it.

And so that didn't seem to be a very good reason. It does seem like a facial challenge, though, to their rule that you just need to have a bathing suit on if you are at the beach is not a very strong case, is it?

MR. GREEN: Pardon?

THE COURT: That doesn't seem like a very strong case, the facial challenge, if you take it out of the particular fact setting we were presented with at the injunction stage, doesn't seem like there's much left.

MR. GREEN: And we are not challenging the ordinance on its face. We are questioning its application to expressive activity that is at the core of the First Amendment.

THE COURT: But don't you need some sort of concrete facts for that? I mean it seems like you would need some particular facts to, that would give rise to it. I don't understand how you could decide that in a [5] vacuum.

MR. GREEN: I agree, Judge. I mean I can, if you direct me, I can tell you, you know, what we continue to offer to do and where it's falling apart. But there was some discussions at mediation and there, you know, I can tell you what we're willing to do right now, but I'm not sure that it's going to get us where we want to go.

We tried to settle this case right after the injunction and the defendants have taken the position that there are going to be no nudity anywhere on any state park beach in the State of Florida and they want to go to the mat on that.

And we are not challenging the facial constitutionality of a general rule against nudity. We are challenging the constitutionality of such a rule as applied to expressive speech, expressive conduct, that is at the core of the First Amendment.

And if you want me to, I can, I think I have distilled the arguments on both sides down to a fairly simple proposition.

THE COURT: Okay.

Let's hear from you on that, because I have a hard time understanding that in a, I guess just as a proposition, that there's some First Amendment right to [6] nude expression in state parks.

I mean, without the particular facts that gave rise to the last one, it seems to me if you let somebody, if you allow some nude expression but then draw the line at the anti-war protests, I don't have a problem with that case, that seems to be the case we had before, and I don't think you can do that.

MR. GREEN: Right.

THE COURT: But I'm not as convinced that you can say, well, look, we state parks aren't a place for plays or performances of any kind, if you want to do a performance you have to have your clothes on, why can't you say that?

MR. GREEN: Well, their best case is Pabst, City of Erie versus Pabst. That was a case decided by the Supreme Court a few years ago. In that case there was a general ban on nudity.

THE COURT: Isn't that a topless dancing case, though?

MR. GREEN: Adult entertainment case. And the Court there said that there was a four, two, three, but actually two dissents, I will call it a four to three decision, under Justice Scalia's concurring opinion they went, he just said it was a general ban on nudity, there's no First Amendment right involved, end of [7] story.

And if the Court adopts that, you know, that is one position, but that was not the majority decision in the Court. And it was a plurality and if you look, and you have to look, under the Marks against U.S. case, you have to look at the plurality decision as being the decision of the Court.

THE COURT: But even if you accept the plurality position in Erie, isn't there a difference between a state park where they have some I guess proprietary interest as opposed to just I guess topless bars and generalized ban against topless bars?

It seems like state parks, they ought to be able to have, there's a stronger interest with respect to state regulation. Otherwise, you get to the point where I guess every state park has to, if somebody wants to pursue some sort of expression that involves nudity, it has to be permitted.

Is that basically your argument?

MR. GREEN: I am not sure I heard that.

THE COURT: As I understand it, what you would say, you mean, but the topless bars have moved into this secondary effect and zoning and all that, and it seems like I guess every community has to, I guess can't preclude it entirely, it has to have at least some [8] avenue for that.

MR. GREEN: Right.

THE COURT: But that's private property. People wanting to perform plays, isn't there a difference between those cases and a state park where you just have a uniform rule that you can't have nudity?

MR. GREEN: There is a difference.

First of all, with respect to adult entertainment, the courts have held that that is an outer ambit of protection, and what Pabst was was an adult entertainment case, they said at least with respect to adult entertainment there's this general ban passes constitutional muster, it does not violate the O'Bryan test. You know, they talked about secondary effects, they talked about all sorts of things in Pabst.

And again I am talking about the plurality. But the plurality was very careful, as was the dissent, to note that they weren't dealing with theatrical productions like "Hair", they weren't dealing with "Equis" or "Oh Calcutta" or "Ballet Africante". The Court was very clear about this not being that kind of speech. Adult entertainment is not a theatrical production and it's certainly not an anti-war protest.

And in weighing, there are interests that the [9] State has in preserving the park for competing uses. This is not a single use park. This is a multi-use park.

The Eleventh Circuit in Maturest [sic] Society held that this very park was a public forum for, traditional public forum for expressive purposes, for speech, for demonstrations, for protests, so we are dealing with, as Your Honor noted in the opinion, a case that has some history.

And we have a decision from the Eleventh Circuit that this is a public forum. Once you start o with a public forum, they can impose reasonable time, place and manner restrictions, and the question for Your Honor, I will try to get more specific about where, what we could have done in this case, which is take a voluntary dismissal, we could have taken a

voluntary dismissal and worked out other terms, that would have been fine, we could have come back to Your Honor early next month with our next protest, and the next protest is going to be an anti-war protest. And I believe it's based on a Salvadore Dali play, but we can talk about that, but we are seeking nominal damages.

We have done everything that we can to narrow the focus of this case and not take any more court time. We have waived jury trial, we have waived any [10] claim for damages in excess of twenty dollars. We have done everything we can to try to narrow the issues and to not burden the Court with future litigation.

And the reason we will be seeking a permanent injunction in this case is the State has taken in its papers filed in opposition to the preliminary injunction and continues to take in its motion for summary judgment the position that it can ban nudity everywhere in every park, and while it does have a significant interest in allowing the park to be used for many uses, given the political nature of the speech, which is at the core of the First Amendment, you have to give that considerably more weight than the Court gave the interest in dancing nude in Pabst. The Court was pretty clear about that.

Since then there have been a couple of other decisions that have interpreted Pabst and have held that ordnances or rules, laws that constitute general ban on nudity cannot, are overbroad to the extent that they apply to I think theatrical productions and certainly in this case political protests.

THE COURT: Is there any case dealing with a, some sort of nude expression in a park or public forum?

MR. GREEN: No. But there's an Eighth Circuit case and I believe a Fourth Circuit case that deal with, and I can provide Your Honor and opposing counsel copies [11] of these later, one is Giovanni Carondola, 303 F.3d, 507, and there's another case out of the Eighth Circuit which I am looking for

and don't seem to have my, can't seem to put my hands on, which says that essentially that broad bans on both in public and private nudity or places open to the public nudity violate, it's actually City of Lincoln, Ways against City of Lincoln, 274 Fed.3d, 514.

Both of those cases are distinguishable to some extent, but the Court did hold that the general bans on nudity were overbroad as applied to theatrical productions and they didn't discuss political protests. And here we are dealing with both a theatrical production, it may not be the kind of play I would spend fifty dollars to go see or a hundred dollars to go see in New York, but it is a theatrical production, and there's also a political protest, and the political protests are going to continue.

On February 14th, you know, my client intends to put on a theatrical production, I think based on Salvadore Dali, that is against the war, that protests the war. And even if we took a voluntary dismissal we would have to come back here for another injunction.

THE COURT: It seems like parks are different, I mean most people, you are correct, it's perhaps [12] multiple use, most people go there for, to go swimming or bathing, that kind of activity.

All those other theatrical productions or topless dancing or all of those cases are essentially located in a forum where people who want to see it go there and see it as opposed to a park where most of the people who are there didn't go for the purpose of seeing these protests or these nude protests.

Doesn't that make a difference in the analysis?

MR. GREEN: Well, perhaps if we were dealing with a very small single use park like Stephen Foster State Park up in the northern part of Florida where they have every year, you know, festivals for music.

THE COURT: Because the State apparently did try the route under your consent decree of, you know, put a screen up and leaflets and if somebody wanted to go see it that was there at the park they could. Apparently your client didn't want to do it that way and ignored the screens and felt that was an unfair restriction on her ability to do this.

MR. GREEN: There have been screens put up in the past. In fact, there was a screen that was put up on February 14th of 2003.

THE COURT: But they ignored it, didn't they? [13] They set up in front of the screen, as I understand.

MR. GREEN: They, in effect, ignored the screen. There obviously will be some testimony about the failure of any state official to tell Ms. Wyner that she had, where in relation to the screen she had to be, there's absolutely no communication whatsoever to Ms. Wyner about that.

But, you know, it may have been obvious to everyone there who went to the protest, and there were a number of people who went to the protest, what the purpose of the screen was.

But under the United States versus Baugh case, which is cited in our papers, the remedy to violations of reasonable time, place and manner restrictions is not to ban the speech, it's to enforce the regional time, place and manner restrictions. That's what Baugh says.

You can't deny free speech because of either past conduct or anticipated future breaches. You allow it and then you regulate through either warnings or arrests and prosecutions the violations of the restrictions as long as those are reasonable time, place and manner restrictions.

That's what Baugh says, the Ninth Circuit case cited in our papers.

THE COURT: But how this would work then [14] would, any state park presumably, while you could have a time, place

or manner restriction, you would have to allow nude expression, don't you end up almost in those topless bar situations where you end up almost zoning every state park setting aside some space that would be available if somebody wants to perform this type of protest?

MR. GREEN: That would certainly be one response that the State could adopt.

THE COURT: I mean isn't that the inevitable end to that type of ruling?

MR. GREEN: Not necessarily. I mean, as I said before, there are some nature preserves that are just, you know, where there's no recreation allowed, and we have dozens and dozens of state parks in Florida, what we, some of them like the Stephen Foster Park is, you know, an outdoor area that is used primarily, when we talk about expressive activity, for music festivals.

You have other parks that are accessible only by boat. You have other parks, like John Pennecamp Park, that is mostly under water. You have all different kinds of parks in the State of Florida.

This park, the John D. MacArthur Beach State Park, is a multi-use park. If you look at the deposition of Terence Coullitte, he was the defendant in [15] this case, he said there are many uses, you've got a nature center, you've got an auditorium, you have people snorkling, you have people, you know, you can go on to the beach, you got people going on nature tours, there's a lagoon, on the west side there is the Munion Island which is kind of a mangrove area.

Then you've got the beach. And we're dealing with free speech on the beach. And this is an area that is approximately a quarter to a third of a mile north of the boardwalk.

THE COURT: Okay. Well, let me hear from the State on this issue.

MR. WILLIAMS: A couple of issues, Judge, if I, just to respond. I think one interesting case that might be helpful here is the Clark versus Community for Creative Non-violence case. It's a case that took place up in Washington, D.C., and the issue there was this Community for Creative Nonviolence wanted to come in in a protest against or a protest benefiting the homeless, they were going to set up tents and sleep on the mall in Washington, the U.S. Parks Service said we don't let people sleep out here, and that is the issue that went up.

And what the Court said in that case is that, irrespective of the nature of the political speech [16] there, you know, these rules were in place, as long as a rule is a content neutral across the board ban on conduct, not on speech, not on the expression that is the focus of the demonstration—

THE COURT: That just gets to the definition of it. Sleeping isn't part of the protest. I mean her contention is the nudity is part of what she's, part of her expression as opposed to, so it seems like that the tents on the mall case doesn't really help. I mean, it may be that expression doesn't include nudity, and that is I guess Scalia's point, but if it does how do you deal with it?

MR. WILLIAMS: With all due respect, Judge, I think that is the point. And what the courts have said over and over in a number of cases and what the Supreme Court—

THE COURT: What's the point?

MR. WILLIAMS: That nudity is not part of the expression.

THE COURT: Yeah, but what about a topless dancing cases? They have over and over said that that is, although it's at the outer fringes. What's the difference about that and what she's doing?

MR. WILLIAMS: Actually if we look closely at the topless cases, Judge, City of Erie is a good example [17] and I have

that one in front of me now, the Court starts out there by saying that being in a state of nudity is not inherently expressive conduct.

If I can get right to the page here, I don't see the quote I am looking for, but they say repeatedly in that opinion that that is not the conduct protected by the First Amendment. The conduct that is protected by the First Amendment in Erie is the dancing. The nudity itself is not what's protected.

THE COURT: Right. But I mean again that is not what—she says nudity is part of what she's doing, her performance, at least the peace symbol, that was, you know, she was trying to portray this vulnerability and that was an aspect, in the same way I guess the nudity is part of the dancing, an aspect of the performance.

MR. WILLIAMS: She does say that, Judge, and it's clear that Ms. Wyner has taken that position in this case.

We think the position is flawed. What we're dealing with here, she's putting on an anti-war protest and the core of what she's doing is she's creating a peace sign and that is the message.

Her choice to perform that in the nude is something that she thinks adds something to that and she [18] will tell you and has testified in this case that that shows vulnerability and all these kind of things.

We believe that if we look at the cases and apply them to this factual pattern here, if you have Ms. Wyner comply with the bathing suit rule in this case, what does she do? She puts on perhaps a thong and bikini top. Does that detract in any significant way—

THE COURT: Isn't that the same argument, though, in the topless dancing, if you put on a shirt you can do the same dance? I just don't see how that is a distinction that you can make at least in terms of the expressive part of what she was

doing. I mean I guess I see your point, you are arguing for the Scalia or Easterbrook rule, which is just nudity is not part of expression.

MR. WILLIAMS: Even in the plurality opinion Justice O'Connor wrote in that, in the Erie case, Judge, they talk about the idea that putting on, in that case I think what they required was pasties and a G-string, if memory serves, and they said the de minimus effect of requiring that these people put on that insignificant amount of clothing does not take away from the message, which is the erotic dance.

Likewise, in our case to require someone whose primary message is one of peace that they are trying to [19] show through this peace sign, by having them do that with a thong and a bikini top does not in any significant way take away from the idea of vulnerability.

There's certainly not going to be a suggestion out there that anyone is hiding a weapon in skimpy clothing like that. And the Erie case is pretty clear on that point. I think the other cases along those lines support that same argument.

I found it interesting in looking at this case, there doesn't seem to be any case out there that addresses this specific issue in a context that is really truly analogous here, and I think the reason for that is because, you know, the idea that the Supreme Court has posted is that it has to be a content neutral analysis, and that's why you don't have much of a distinction in the case law between topless dancing and a political demonstration.

We could, probably everybody in the courtroom here would agree that, you know, in a vacuum it seems like the political demonstration ought to get more protection than the topless dancing, but in point of fact what the courts have said is if it's a content neutral analysis, what you are doing is you are looking at the rule to see if the rule was promulgated for

[20] reasons that don't have anything to do with the content of the expression.

The other cases, as you know, the cases where, dealing with the "Hair" play, for example, and some of those cases, none of those are in the same kind of a context. Those, some of those cases involve prior restraint issues where they came in and they had, I think in the "Hair" case there was a public theater there and they were letting everybody else use it and they came along and, based on the content of this one play, they said, no, you can't use it, and they didn't have a very good evidentiary basis for it, another distinction from the case that we have here.

We think, Judge, that a trial in this case will allow us in a way we were not able to do on very short notice for the emergency hearing to distill some of the reasons why the statement is concerned, to distill better for the Court the reasons why the rule has been applied, and those kind of things.

THE COURT: Well, I guess I am not clear on what the factual disputes are. What are we going to distill? I mean we, as I understand it, you had a consent agreement that you were following, it's unclear to me how long that was supposed to last, but in any event, apparently whenever she wanted to perform she [21] called the park and they would say come on out, and she did it for several years, didn't she?

MR. WILLIAMS: That is an excellent point, Judge. That agreement actually dealt with a single performance that was to take place back in 1996. In point of fact, what the facts will show is that from that time forward, first of all, if I recall correctly, I believe it's addressed in our responsive briefs in this case, even on that instance she didn't perform behind the screen, she hasn't performed the play a number of years until this last year.

The facts that will be presented will show she has only performed the play in the nude one time since 1996. She hasn't come out there on a number of occasions. The facts, as distilled in the trial, will show in point of fact she was told as early as 2001 that she was no longer going to be allowed to go out there and not be in compliance with the bathing suit rules. There's correspondence to that effect.

The park service decided back in 2000, which ironically is about the time Erie came out, that an across-the-board ban, not ban but across-the-board bathing suit rule, if you will, requiring a certain amount of clothing in these parks, was going to be the standard in the future. And the law supports that.

[22] You have commented earlier today that, based on the testimony that you heard last February, there seemed to be some distinction by the park between the play that had been performed in the past and this demonstration, and I apologize to the Court, we were on very short notice, the way we presented our facts may not have been everything we wanted on that day.

I think what the facts will show in a trial is that there is no separate analysis, everyone is required to adhere to the bathing suit rule, and—

THE COURT: Well, I think you will be repackaging facts. I mean I asked the question. I asked him, what's different about this one that you can't, you didn't want to let her do it? He said this one is an anti-war protest. That is what your witness said. I guess you can dress that up in some fashion but that is pretty much what he said. Is what you are saying he is going to have e better story this time?

MR. WILLIAMS: Judge, what I am saying is that the guy that got called on on a few hours notice to testify last year might not have had all of the facts at his disposal that he should have before he came in and testified.

I think that the facts, as they have been distilled in depositions in this case and as they will [23] come out at trial, would show that, in fact, irrespective of what Mr. Scalco's perception was, that, in fact, the ban on nudity in state parks has been applied evenly for all purposes since 2000.

THE COURT: Okay. We all—what facts are in dispute here? I'm not sure I understand about distilling facts. What are the facts that we need to have a trial for?

MR. WILLIAMS: Well, we talked in our opposition to the plaintiff's motion for summary judgment, Your Honor, about a number of fa[illegible] that we dispute as set forth in that motion for summary judgment, if I can put my fingers on it.

THE COURT: It looked like mainly, other than the classified immunity point, you argue the state is immune, but it's hard to—I don't see how that can be ripe with respect to their claim for injunctive relief.

MR. WILLIAMS: By the way, Judge, I agree with that with respect to injunctive relief. My argument was only with respect to any money damages.

THE COURT: And apparently they are only seeking fourteen dollars. But it does seem to me, I'll give Mr. Green a chance to respond, but it's hard to see why the park people don't have qualified immunity, so as I say, I think this case is really about an injunction, [24] and that is, since she did her performance, I guess I still, I'm still not clear why y'all are continuing to litigate this.

Go ahead. I interrupted you.

MR. WILLIAMS: I am struggling here to find our dispute of their facts in the record, which I read just a very short time ago, Your Honor. I know we have a difference of opinion as to whether or not the time, place and manner restrictions that have been applied in the future have been effective, and that is addressed.

As Your Honor has already alluded to, there has been an assertion by the plaintiff in this case that she has been threatened with arrest. We have never threatened her with arrest with respect to her request for the performance last year nor this year, for that matter. The letter we sent to her does not suggest she's going to be arrested.

Again, the plaintiff has repeatedly indicated she is not going to use the screen that has been put out there. There is a significant issue that seems to have come up concerning whether or not the parks have some interest in having people put on clothes, and it has been asserted repeatedly by the plaintiffs in this case that there never has been any harm out there.

There has been at least one deposition taken [25] in this case from a school teacher who was out there on the day of the demonstration last year who testified that her second grade class was denied the opportunity to go out and enjoy the beach.

There are a number of other anectdotal instances where patrons of the park have not gone out to the beach because there were nude people on the beach, times when people have left the beach because they didn't want their children exposed to this.

And before I pass this over too quickly, Judge, this really is the core of DEP's concern here. The majority of the citizens in the State of Florida are not interested in nudity in their public parks. You go to the public parks to participate in a variety of kinds of recreation.

In this particular park it has been well recognized it's primarily one of natural scenic beauty. There's not a lot of construction in this park. There's not a lot of volleyball and those kind of things. What we have primarily are nature oriented activities, nature classes, kayaking, fishing, going to the beach, swimming, snorkling, those kind of things. And that is very important.

I do not think that the Court had the benefit last year of hearing a good representation of the [26] State's concern with respect to park goers and citizens of the State who go out and want to enjoy these places without being exposed to the nudity that Ms. Wyner and her associates advocate.

There are, and I will just direct the Court, if it may help you, to our memorandum of law in opposition to plaintiff's motion for summary judgment, and beginning at page 2. There seems to be some dispute as to what relevance or what significance the comments of the attorneys for DEP have. You can find that at page 5 of our disputed facts.

THE COURT; I thought that went to the qualified immunity issue. Doesn't it? Isn't that the only place where there was some argument about what the lawyers were saying? I thought the plaintiff was arguing that basically the lawyers decided this, not the fellow or the park, and so therefore he didn't, that he wasn't entitled to qualified immunity. But I thought that was their argument.

MR. WILLIAMS: That was their argument I think for the purpose of a motion to compel seeking to have the attorney's work product declared available to them. I think the Court already determined that, for that purpose the, there was no waiver of attorney/client work product privilege.

[27] THE COURT: But what the lawyers said or didn't say, why is that a factual dispute that makes any difference?

MR. WILLIAMS: We think it is not relevant and it's not part of the case, Judge. But the plaintiffs have asserted that it is an important aspect of the case in their motions.

THE COURT: Well, tell me what you think is a factual dispute we need to concern ourselves with.

MR. WILLIAMS: Other than those things we have already mentioned, Your Honor?

THE COURT: Well, you said to show how strong the State's interest is in a park. I'm not sure that—it's hard to see how we're going to have a trial about that.

MR. WILLIAMS: Well, the testimony from various persons who work within the park about the reaction of patrons in the park of nudity I think is very relevant to determining whether or not there's any State interest that is being protected here.

The plaintiffs seem to claim when they refer to Terry Coullitte's testimony that there is no harm, we can go out there and we can put on this play, we can all have our clothes off on the beach, and nobody is affected by this, it doesn't cause any problems.

[28] And, as a matter of fact, you know, historically what we have seen out there, if we are going to go down the path of sort of historically what has happened out there, there were a lot of problems, legal problems, when nudity was first banned at the park, and then moving forward more recently we have less of those more sexually explicit problems.

We have a very serious problem with people who enjoy this park for what it is, an area of natural beauty, scenic area that they can go and enjoy, and they go out there and they are completely denied the opportunity to use any area that's even reasonably close in proximity to where Ms. Wyner and her associates are putting on their performances, and we feel that is something the Court has not heard a lot on lately or has not heard a lot on in the initial hearing and may be relevant to the Court's determination of, under the O'Bryan test, whether or not the State has an important or substantial interest that would allow them to put forth the regulation that they have.

THE COURT: Okay. So the importance of the park. Anything else that you think we need to hear evidence about?

MR. WILLIAMS: The effectiveness of various time, place and manner restrictions which have been [29] discussed in the past and which were discussed ad nauseam during the hearing last year, Judge, is an important issue that I think the testimony needs to be taken on.

THE COURT: That's basically what, just whether a screen works, is that—is there something besides that?

MR. WILLIAMS: Whether or not a screen or anything else out there short of this rule would be effective given what has been the position of Ms. Wyner and her associates with respect to where they can do their performances and how they can do their performances.

If you could bear with me just a minute, Judge.

(Pause.)

As the case stands now, it looks like there may be some issue as to what Terry Coullitte's duties and responsibilities and functions are and what represents a discretionary responsibility and how far his authority goes.

It occurs to me that in the plaintiff's motion for summary judgment they have challenged the extent of Mr. Coullitte's authority and so the Court probably needs to hear from Mr. Coullitte on that issue exactly [30] what it is that he does out there and what the extent of his authority was.

There seems to be some discussion, although not a lot I guess at this point, as to what the, procedurally how the correspondence came back to Ms. Wyner indicating to her that she was not going to be allowed to violate the rule. She would be allowed to hold a demonstration, but she would not be allowed to violate park rules, and specifically the bathing suit rule seems to be an issue.

This relates a little bit to what we talked about before, but the extent of the scheduled activities out there at the park, whether it's other plays, school children going out there, field trips, those kind of things, seems to be a small issue.

Weddings I guess have been suggested as something that goes on, workshop stills, there, I think for the purpose of determining what is an appropriate kind of restriction out there, the details of what happened last year and what has taken place in the past when Ms. Wyner and her associates came out to perform these various plays and demonstrations would be a factual issue.

I believe we provided for the Court the unit management plan for the park, which includes the [31] appropriate uses for the park, puts the acquiring of the park into some historical context with respect to its conservation nature, the reason it was donated in the first place.

THE COURT: Well, was she wrong about all that, MacArthur used to like to go out there and skinny dip, that's traditionally what the beach was partly used for?

MR. WILLIAMS: I don't know that I would go so far as it's traditionally what the beach was used for. There seems to be ample evidence that Mr. MacArthur on some occasions went out there and skinny dipped.

Whether he did that frequently or not is something I've not seen any evidence of. It certainly is clear that there were a group of people back when the place was known as Air Force Beach who considered it to be a place where they could go out and take their clothes off to sunbathe or do whatever they wanted to.

The testimony from the folks from the DEP, Your Honor, would reflect that once the park was deeded over to the State and the State came in and began enforcing its regulations they found a world of problems with criminal activity that was going on out there, and over some period of time that has been taken care of. Of course, because of reinforcement of the laws and [32] regulations, a lot of that has gone away.

And while I don't think that I would agree that the facts will show that this was a nude beach, the facts will certainly

show that it was used in that fashion by a number of people for a number of years. We don't contest that.

THE COURT: Okay.

MR. WILLIAMS: You want me to continue, Judge, with respect to factual concerns?

THE COURT: If you have some more on them.

MR. WILLIAMS: There's going to be a significant factual dispute over whether or not Ms. Wyner knew or should have known about the restrictions imposed last year when she put her play on outside the screen, not play, but her demonstration.

THE COURT: When you say last year, you mean after the injunction, what do you—

MR. WILLIAMS: Yes, sir. There may be some question as to whether or not these regulations are endorsed in other parks around the state. The evidence from the State would be that they are, they have been.

There apparently is going to be a factual dispute over whether or not Ms. Wyner made a conscious decision that she was going to intentionally not go behind the screen.

[33] I guess, and I don't know if this is the case or not, but maybe there's going to be evidence of what the plans are this year, and we need to put on evidence to address how that might impact the park. That is going to be something we're going to handle here.

And we too, Judge, like Mr. Green, would encourage a resolution to this matter short of having to go through this process of having temporary restraining order motions and emergency hearings.

We think it's probably not the best way for us to present our evidence to the Court. We think it's disruptive to the Court. I can tell you it's disruptive to the State and its agencies. We need to have some resolution of it.

THE COURT: And you don't think you can just—I mean it seems like y'all were, for the most part, y'all were able to work together to accommodate these varying interests before the last injunction. It has been several years it seems like where you were able to work things out to mutual satisfaction.

MR. WILLIAMS: My understanding, Judge, is that after the 1995 agreement was reached with pending litigation there was not an awful lot of discussion. It's easy in reading some of the materials to get the impression that Ms. Wyner has been out there on an [34] ongoing basis, you know, year in and year out, maybe more than once a year, something like that. That is, in fact, not the case. She's actually only been out there, that we know of, or we have any discussions about this, on two or three occasions since 1995, and—

THE COURT: I think that's what we—that's what the testimony was. There might have been an argument over one time or another, but I think two or three was essentially what y'all said. But she had been able to call your park people and apparently do it at least on those occasions.

MR. WILLIAMS: It's my understanding she only performed the thing in the nude on one occasion between 1995 and 2003, if I understand correctly, Judge. Perhaps on two occasions. And, you know, it's interesting, we have heard a lot of talk in the case about the State violated its agreement from 1995. First of all, the agreement was for one year, so—

THE COURT: Does it say that somewhere?

MR. WILLIAMS: Yes, it does. The agreement in its very, in the language there, talks about I think a specific date when this demonstration—

THE COURT: Where's that? Why would you set up all that procedure if it was just for one occasion? I don't remember seeing a date on it.

[35] MR. GREEN: It specifies February of 1996. But nothing to limit it to that. And the reason we set up the procedure was, they went to 1997 and at least one other year beyond '97. But in any event—

MR. WILLIAMS: The irony of all that discussion, Judge, is that it is Ms. Wyner who has repeatedly refused to abide by the time, place and manner restrictions that were established in good faith back at that time.

THE COURT: I'm sorry, I was reading something. What was your last sentence?

MR. WILLIAMS: I said the irony of this discussion about the State somehow violating this agreement is that it's Ms. Wyner who has consistently refused to abide by the time, place and manner restrictions agreed to in that back in 1995.

THE COURT: You mean the part about the screen not, refusing to be behind the screen, or what?

MR. WILLIAMS: That's correct, Your Honor.

THE COURT: All right.

Okay, Mr. Green, in terms of factual disputes, what are they, and do we need to have a trial?

MR. GREEN: Your Honor, we do not believe there are any material disputed facts. There might be some nuances the parties disagree about, but the facts [36] themselves are, material facts, are not in disagreement.

If I could go through a couple of the issues Mr. Williams raised, first he said, well, Mr. Scalco, who was Peter Scalco, who was the witness who testified at last year's hearing in February, didn't really know what he was talking about. That is totally inaccurate. He was the, in fact, just a few months ago he was the State's designee as the person with the most knowledge on behalf of defendant Struhs, who is the head of DEP.

Mr. Williams talks about some issues of relevance. There's some disputes about certain facts. But relevance is, if the fact is irrelevant and it's not material, if it's not material it doesn't count as a disputed fact for summary judgment purposes.

I think it is his purpose to—he talks a lot about the use of the park. We stipulate that the State has a significant interest in allowing the park to be used for many different uses.

In fact, if you look at defendant Coullitte's, the park manager of John D. MacArthur State Park, he testifies at length; A, there is a park management plan; B, the park management plan, which I believe the defendants have provided and is part of their summary judgment papers, contemplates multiple uses not just in [37] other parks around the State but in particular this park. There probably are 10 or 15 different uses that are contemplated.

Defendant Coullitte has indicated at his deposition, and the deposition is part of the summary judgment papers on file, that, if I can just get out the motion in limine, in the motion in limine, Judge, Mr. Coullitte says, oh, he could have managed the use of nudity, he didn't think there was a particular problem with public nudity at the park, he could manage it.

THE COURT: But they passed a rule against it, though, didn't they?

MR. GREEN: There was a rule against it back when the stipulation was entered into in 1995. There was a rule that, there's a rule enacted back during the Nature Society versus Philion litigation.

THE COURT: But the stipulation, I'm not sure I understand your point, I mean they did enter into a stipulation where they have this, Part 2, they recognize nudity coupled with expressive activities is generally protected by the First Amendment, but that—

MR. GREEN: He says the rule was in effect when they signed that stipulation. There hasn't been —

THE COURT: Are they locked into that? Basically there have been some changes. Whether or not, [38] whether, maybe they were unwise to have signed that if they wanted to keep enforcing their bathing suit rule, but. . .

MR. GREEN: Well, Judge, actually we don't think there has been a change in the case law with respect to innocent nudity associated with either political expression or theatrical productions.

THE COURT: Well, if somebody wants to put on "Hair" out there, a company decides we are going to put on "Hair" out at the park, is it really, it has to be a time, place or manner restriction and that is a use that the courts should enforce?

MR. GREEN: Yes. And, for instance, "Ballet Africana" was I believe performed at a public beach or a public park at Long Island.

THE COURT: What is that?

MR. GREEN: "Ballet Africana" is an African based ballet and performs in public places, and that goes back almost 30 years ago, if my arithmetic serves me right. "Ballet Africana" was permitted to perform in public spaces and that involves nudity. Again it's a theatrical production.

If I can go back to a point I started to make, and I don't think I made it as clearly as I would like to have, Pabst says general bans on nudity as applied to [39] adult entertainment do not violate the First Amendment. That's what they said. They also make it clear in the majority opinion that, at least two occasions, that adult entertainment or dancing, you know, in the nude for adult entertainment purposes is at the outer ambit of the First Amendment.

The Court was careful to note in a couple of places by the majority opinion and also in the concessions made by the

lawyer for the City of Erie that it did not, that the ban did not apply to "Ecquiese," did not apply to "Hair", did not apply to "Oh Calcutta" or other theatrical productions. We cite that in our footnote, which I believe is footnote number 2, in our reply to defendant's motion for summary judgment.

The Court there said there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message.

The majority said, "Even though we recognize that the First Amendment will not tolerate the total suppression of erotical materials, they arguably have some artistic value. It is manifest that society's interests in protecting this type of expression is of a totally different and lesser magnitude than the interest in untrammeled political debate." This is from the majority opinion in Pabst.

[40] They go on to say, "Few of us would march our sons and daughters off to war to preserve the citizen's right to see erotic adult entertainment." Then the dissenters note that the City of Erie's counsel stated that the general ban would not apply to productions such as "Ecquiese," "Hair", "Oh Calcutta."

And then if we go on to the Ways case, the Eighth Circuit—

THE COURT: Is there any case that has applied that in the context of a forum that is basically opened and freely accessed by people, by—for example, could you do this in Grand Central Station or Florida Field or any of the other—

MR. GREEN: Well, Grand Central Station would be more like the Ishcon case, the Minnesota Fair case, where you have a lot of traffic that's moving through.

THE COURT: So what's the, the State's interest is movement of traffic, is that the distinction?

MR. GREEN: Movement of pedestrians, you know, you have to move a lot of people through quickly. And also in the airport solicitation leaflet cases the courts have said, well, solicitation when you've got a lot of people moving in and out, solicitation, it was a five-four decision flipping, solicitation can be banned [41] because it takes more time, leaflets in an airport cannot be banned because it takes less time, the interest in moving pedestrian traffic through an airport and the, you know, I guess I call them the Hari Krishner cases.

Then there's the Minnesota, I think it's called Ishcon, the Minnesota Fair case, where they talk about the interest in moving large groups of people through the Minnesota State Fair. So you have a traffic situation, a pedestrian traffic situation, and the Court says that is a very significant interest.

Here we've got the, their own park manager, the defendant in this case, Coullitte, saying he could have managed this, consistent with all the other multiple uses at the park. That is his testimony. And it's undisputed.

And so we don't have a problem like an airport, we don't have a problem like Grand Central Station, Minnesota State Fair or even Lafayette Park, which is right across from the White House, where you have all the national security concerns.

This is a quintessential public forum open to multiple uses.

THE COURT: But I guess the nudity has virtually or very little contribution to the [42] expression. I mean assuming it has some.

MR. GREEN: In our case it is absolutely core to it. You have nude peace signs being performed by—

THE COURT: That case is over, unless—it seems like the common theme of the plaintiffs is just the nudity. I mean she—

MR. GREEN: No.

THE COURT: —there have been a number of variations, but the "MacArthur, The Man And The Beach" versus the peace sign, it seems like the common denominator may be the nudity rather than the expression.

MR. GREEN: Judge, I hate to say this, but I have been doing these cases for 25 of my 27 or 28 years of practicing law, starting with the Nelson case, the McGuire case, the Duese case, the Simon case, the naturist case, the T.A. Wyner case, and yeah, nudity, the skinny dipping, the traditional use that this park was used for has been at the core, and this is not just nudity in the abstract, this is nudity tied to a particular place.

We have the Florida Supreme Court acknowledging—

THE COURT: But the nudity, isn't that a different issue?

[43] MR. GREEN: Absolutely.

THE COURT: She's tying hers to the First Amendment here, and I might wish that freedom was broad enough to encompass some general right to nudity, but it doesn't look like it is.

MR. GREEN: I agree one hundred percent. And I can't, that's what the Supreme Court has said, that's what the Eleventh Circuit said in South Florida Free Beaches, but South Florida Free Beaches, followed by all of Florida's Supreme Court and District Court precedence, has said that nudity standing alone is unprotected but nudity coupled with other expressive activity is protected. And here we have theatrical activity, expression, and we have political expression.

THE COURT: But this is the only one where I am aware of where you are not in a facility where basically people who don't want to go just don't go. I mean a topless bar, you can uphold an 18-year-old limitation or 21, whatever the limit is, plus anybody that goes there chooses to.

And the same thing with "Hair" if it's in a theater. But a lot of the people who might go to the park, most have no interest in it, some would be offended by it, and I guess a few want to participate. So isn't that really what the State is confronted with?

[44] MR. GREEN: Well, that's what the State says it's confronted with.

THE COURT: Isn't that a fair—

MR. GREEN: Mr. Scalco said, well, the plays might be protected but not the anti-war demonstrations.

THE COURT: Well, except we're not in that circumstance now. At some point they ought to be able to make the decision without dealing with the history. And that was the reason for the injunction. That issue is now moot, isn't it?

I mean, we entered a preliminary injunction that was of a certain duration, she did her play, and so it seems to me the danger at least that we saw then, which was a decision being made based on content, is no longer present.

Here they say, well, we just want to stop the nudity regardless of what kind of play she wants to do. It seems like if there's ever a time for them to present the issue in that fashion it would be now if they can ever get away from their history.

MR. GREEN: Well, I didn't write the opinion that Your Honor wrote. In your opinion you indicated that nude overtly political speech—

THE COURT: Yeah, that line was a little broader than probably I contemplated at the time.

[45] MR. GREEN: Well, but the fact of the matter is, Judge, you know, we—

THE COURT: I mean I, the opinion could be read different ways, but really the reason for the opinion was his testimony

that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction.

MR. GREEN: Right. But since then we have gotten testimony from the park manager who says, first of all, I will say, A, this is a public forum, B, notwithstanding the fact that it's a public forum, the State has a significant interest in maintaining the use, a solitary use or a multiple uses, and if it wants to maintain a solitary use then it has to enforce the voluntary use, but once it opens itself up to multiple uses it can't—

THE COURT: Can't you still look at the purpose of the forum? I mean this isn't a state theater. I could see the argument if this was a, it's a, I don't know if they still have them, a state theater where they allow people to come put on all kinds of plays, and if she wanted to put on a play there, there would be, seems like, stronger argument than at a park.

MR. GREEN: That would be a designated public forum and this is a traditional public forum and, if [46] anything, the protection is greater at a traditional public forum than a designated public forum such as a state theater. That is the law.

And if the State just wanted to make this a nature preserve, all you can do is just walk on the boardwalk and look at the nature, it might be able to get away with that. That would probably constitute a significant interest, a substantial interest. However, once the State opens itself up to multiple uses like this and its own park manager says, "I could manage her, I could manage this use and the other ten to fifteen uses—"

THE COURT: What does that mean, though, when he says "manage it"? Does that mean we can just, that there's enough room to separate the crowds, or he would put up signs saying, you know, if you are not interested in nudity don't go down there, is that basically what it is?

MR. GREEN: He could put up signs, he could move them farther north, which would be beyond a point where you could see them from the boardwalk.

Actually, if you go out there, Judge, you know, if you are going to do anything you might want to go out for a tour of the area, if you are on the beach, I mean if you are on the boardwalk and you look out, [47] there's a point that goes around, you can't see beyond the point from the bottom of the boardwalk. So he said, "I can put them out there, you know, I could place them out there."

He also indicated that, this is in the record evidence that was I think even provided by the defendants, he could manage these uses, he didn't have a problem with skinny dipping, he didn't have a problem with nudity, he just didn't have a problem with it. He thought that. You know, this is their own park manager testifying.

So I would agree that there are some hypothetical situations like a nature refuge with a very fragile habitat where you could limit people to walking on the boardwalk and not making any noise, not doing anything else to disturb the fragility of the habitat. We are not dealing with that situation here.

We also have evidence that they have art shows, they have evironothons, other kinds of expressive activity out at this park, and he can manage the park, and he can manage these competing uses.

Getting back to the other issue about whether there has been a threat, that's not a factual issue. She has been arrested a number of times. There have been a number of other arrests at this beach. Morely [48] Schlostic, he got arrested. But, as a matter of law, we are dealing with expressive activity and specter.

There's good language in a case called ACLU against the Florida Bar, I think 996 or 999 Fed.2nd, and in that case the Court basically said that when a state official reminds someone of a particular law and appears to be enforcing that particular law, that is enough of a threat for First Amendment purposes.

THE COURT: Okay, where is the testimony by the park ranger that you refer to or the park manager?

MR. GREEN: It's in his deposition.

THE COURT: That's Coullitte's deposition?

MR. GREEN: It is in Coullitte's deposition. And Mr. Marshall will find that.

By the way, Judge, on Defendant's Exhibit 1 to their motion for summary judgment Mr., defendant assistant general counsel, says violation of any park rules is a misdemeanor which can result in arrest. And that is the January 23rd, 2001 letter that the defendants themselves attached to their summary judgment papers. If that is not a threat, I don't know what is. It certainly is a threat in this context under the ACLU against Florida Bar case.

In footnote 14 in our motion for summary judgment, page 14, we state that Park Manager Coullitte [49] testified that the setup of MacArthur Beach State Park is such that it can accommodate free speech activities that may involve innocent nonerotic nudity which would not be visible from the main boardwalk and that from his standpoint as park manager innocent nonerotic nudity would not present a problem. That is Mr. Coullitte's deposition, pages 83 to 84, and page 99.

And also another witness from the state parks said that the boardwalk is several hundred yards away from the protest area, an area making it impossible to see nudity with the naked eye. And all this is in, you know, footnote 14 with the references.

THE COURT: Okay.

MR. GREEN: So, Judge, as I indicated before, the State does have an interest. We stipulate to that. However, under the facts of this case, there are multiple uses allowed at this park, this is a traditional quintessential public forum that is held open for expressive activities, there is a very real connection between this beach that was owned by John D. MacArthur and the activities and the subject matter of the protest, there's a linkage between the message and the particular place.

Moving on to, I started to talk about the, I'm coming back now to answer a question that you asked me [50] point blank at the beginning of this argument, is there a case that has, post Pabst, that has allowed either theatrical expression or political expression in a public forum that involves innocent nonerotic nudity, and the answer is that I can't find one. I have looked through 120 cases post Pabst. I shepardized it. I can't even find a Law Review article that addresses it.

I spoke with Marjory Hines, who used to head the ACLU censorship project, who was quoted in a Ninth Circuit decision recently on, "The Medium Is The Message," and she says she's not aware of a single case. I just can't find one. So that is an issue for Your Honor, an issue of first impression, in the post Pabst era.

But in the Ways against City of Lincoln case, which I cited at the beginning, I just found this earlier today, the Court says on page 518, "Ballet and theater performances receive greater First Amendment protection than nude dancing and," whatever the ordinance was, "could have been enforced to prohibit the type of simulated sex found to be in productions of 'Hair.'

"The ordinance could also have been enforced to prohibit stage actors from kissing and ballet dancers or ice skaters from lifting each other up by the [51] buttocks if such acts

could reasonably be construed to be for sexual arousal or gratification of any observer or performer."

If anything, Judge, every witness in this case has stipulated that we are not dealing with any kind of sexual gratification here, we are not dealing with any kind of eroticism here, this is innocent nonerotic nudity associated with theatrical expression and political expression.

If Your Honor is interested, and Your Honor could hear testimony at the, at a summary judgment hearing, I don't know if you want to, Ms. Wyner did arrive a little late today, she can testify as to what she intends to do on February 14th, which is another anti-war protest. It will not involve I believe a peace symbol but, you know, I haven't really discussed that with her in full. But there will be another anti-war message as well as a theatrical production.

I think it's also, getting back to the multiple uses, any use, including expressive activities, could interfere with other visitors' enjoyment to the park. If I don't like a message, I don't want to see a bunch of Klans people marching on the beach, I'll just go the other way. Klans people, the KKK, could and should be allowed to protest at this beach.

[52] Another protest that could happen in an anti-war context is for, frankly, I think it would bother people a lot more, perhaps interfere with their enjoyment a lot more at the beach, would be for the protesters to pour blood on themselves. That would be very provocative kind of protest.

But the courts have made clear that the purpose of the First Amendment is to encourage robust debate and thought about core issues and was designed to secure the widest possible dissemination of information from diverse and antagonistic sources.

There are other uses, there are other expressive activities, that would be offensive, that might interfere with my personal

enjoyment of this beach. I can imagine any number of messages. It's still a traditional public forum which is held in trust from time in memorial for expressive activities, Hague versus CIO, I'm sure Your Honor has uttered those words many times. That's what we're dealing with here.

And I do agree that, with Mr. Williams, that there should be a decision, we believe there should be permanent injunction or declaratory relief, we do believe that the 1995 stipulation was not limited to the February of 1996 performance, but I don't think we need to reach that issue at this point.

[53] THE COURT: Well, procedurally, is there any need, assuming I disagree with you on your facial challenge, we have already entered the injunction as to the performance, which is over, is there a need to deal with that in any fashion?

MR. GREEN: With respect to the—

THE COURT: The one she did last year. That has expired of its own I guess terms.

MR. GREEN: Right. That is a—

THE COURT: I mean normally you end up, when you have a preliminary injunction you would, assuming the ruling remains, you would make that a permanent, but when the event has come and gone, what procedurally should you do?

MR. GREEN: Well, where you have an ongoing series of arrests, threats, litigation, settlements, this appears to be an appropriate case for permanent injunctive relief or at least declaratory relief, indicating that expressive activity or nudity, innocent nonerotic nudity associated with political expression or theatrical expression is protected by the First Amendment and cannot be banned.

THE COURT: I understand that is your position. But if I were to believe that essentially the reason for that ruling was the particularized decision [54] the State was making based

on the anti-war content at the time, yet were to believe that on a, in terms of a general rule, they can maintain their bathing suit ban in a state park, procedurally how do I deal with the preliminary injunction? Is it just—has it disappeared? I mean you were a prevailing party.

MR. GREEN: Right.

THE COURT: In terms of the case. At least as to that forum.

MR. GREEN: We understand.

THE COURT: But I'm not—it's not clear to me what, if anything, we need to do with respect to that preliminary injunction and that issue in any kind of final decision.

MR. GREEN: We have attempted to work the case out along those lines, but we have not been able to.

THE COURT: But in terms of, I mean y'all have been able to, but if I were to try to deal with it, how would I do it procedurally?

MR. GREEN: I would suggest that, Your Honor, one possibility would be for you to just issue declaratory relief consistent with paragraph 2 of the 1995 stipulation. That would be one way. That is, you know, a, that's, that kind of medicine is not as strong as a permanent injunction.

[55] Another would be for Your Honor to, and we'll get to the qualified immunity in a minute and why that may or may not be important, another would be for you to issue permanent injunctive relief as it relates to any kind of political and theatrical expression that contains a anti-war message, because that's what's going to happen on February 14th. There's still a war going on in Iraq and my client intends to put on another protest there.

THE COURT: Okay.

MR. GREEN: And so there is a continuing controversy that would—especially given the history of Ms. Wynet and the park.

THE COURT: It's clear she intends to keep doing this and I don't know that the decision has to rest on her I guess future as yet undefined intent as to demonstrations.

MR. GREEN: Well, she has indicated—

THE COURT: Otherwise, we just take the history, I mean, it's almost like saying, well, they stipulated before, so it's got to run on in perpetuity, and I'm not sure that is a fair reading of the law.

MR. GREEN: Well, Your Honor, we do have papers before you indicating, I guess maybe we need to separate this from, you know, kind of Article III [56] standing, there's clearly Article III standing, an ongoing controversy, a history of arrest, not only Ms. Wyner but other people, so from an Article III standpoint she has, based on the prior history, established a case or controversy, she has indicated in her verified complaint that she intends to engage in similar expression in the future, and based upon that we believe that either declaratory or hopefully permanent injunctive relief would be appropriate.

THE COURT: I understand your position on that. I guess I am asking, if I disagree with you on that and deal with it in the statute, that they can enforce their bathing suit ban on an across-the-board basis, not trying to pick and choose between types of plays or expressions, but if they can enforce their bathing suit ban, how procedurally should I deal with the preliminary injunction that was already entered?

MR. GREEN: Well, I believe, Your Honor, and we don't think it would be appropriate in this case—

THE COURT: I know you don't agree with it, but I am just trying to get both of your advice on how to deal with it if that were to be the—

MR. GREEN: To say that the preliminary injunction expired and declaratory relief is appropriate and if there are future disputes based upon the [57] declaratory relief that the Court can retain jurisdiction to consider, you know, future disputes.

THE COURT: Okay. Thank you.

MR. GREEN: With respect to, and if I may confer with Mr. Marshall, to see if he has anything additional. With respect to qualified immunity, Judge, our response to their motion I think sets forth our position. We think that there's a real problem here with discretionary function. Mr. Coullitte candidly admitted at deposition that he didn't think there was a problem.

Your Honor remembers his first response to Ms. Wyner saying he didn't think there would be a problem, that they could work together cooperatively, and then he was told it wasn't his decision, it was going to be made from, by someone higher up, and someone higher up made the decision. He was not performing a discretionary function.

THE COURT: Well, he has one, though. I mean, is that, is the problem you sued the wrong person then? Why wouldn't he still be entitled to qualified immunity because he has a, I guess his position at least has the discretion, if he let the lawyers tell him what to do, does that open him up to liability greater than he would otherwise have?

[58] MR. GREEN: Well, if, actually it does, I mean we believe that if you are just following orders that that is not a defense, and that is all he said he did. He didn't prepare the letter, he didn't even write the letter that was sent to Ms. Wyner saying, well, forget what I said earlier, you cannot perform your protest in the nude.

THE COURT: Well, somebody has a discretionary position somewhere up the line and assuming that person, there wasn't a clear legal rule, clearly established legal rule, then why isn't qualified immunity available?

MR. GREEN: Because it only applies to officials performing discretionary functions and he has indicated at deposition that he was not performing any kind of discretionary function. And if you are just following orders, I mean ultimately the real question is, you know, who, with, if Your Honor, we have the damages claim, albeit a nominal damages claim in there, one of the reasons is to prevent mootness. We want this case to be decided.. I can't be any more candid than that.

THE COURT: Okay.

MR. GREEN: However, we do believe that this is entirely appropriate for denial of qualified immunity.

[59] THE COURT: On this following order theory? Has that been accepted anywhere, essentially following an order?

MR. GREEN: Yes. And there's also a case, I believe following hospital regulations is not a defense, and that's out of the Tenth Circuit I know, and here following orders, there have been a number of cases where just because the supervisor in a police context orders you to use excessive force—

THE COURT: Well, it's not a defense but this is, did it vitiate qualified immunity, what you are saying is it does away with it.

MR. GREEN: Right.

THE COURT: If he made that decision on his own, in a case where he made the decision on his own he would be entitled to it. Is there any argument that because somebody up the line told him to do it that he loses it?

MR. GREEN: We believe that if he, he said he didn't have the discretion, he had to pass this on up the chain of command and they made the entire decision, and, you know, this, no one ever really pays, the courts haven't paid much attention to prong one of qualified immunity, there's actually prong one and prong two, prong one was was he performing a discretionary [60] function, if he wasn't then you don't even get to, you know, was, did he violate a constitutional right and, if so, was the right clearly established, you don't get to that, the second prong.

The first prong is was he performing a discretionary function. The undisputed evidence in this case is he was not. I have never had a case like this before but that's how it came out at deposition.

THE COURT: Okay, thank you.

All right, Mr. Williams, let me ask you the procedural question that I asked Mr. Green just in terms of that injunction, the preliminary injunction. If I were to agree with you on the facial challenge, how would the injunction, but I believe they're the prevailing party with respect to the injunctive relief at least as of when we entered it, although the reason, the driving force for issuing it was the content issue, which I'm not sure that stays there forever, assuming that we find then that you could enforce this general ban on nudity, how should we deal with a preliminary injunction issue?

MR. WILLIAMS: Well, I can't cite you any case law today, Judge. I didn't come here prepared to address that issue. But it's my impression that you have already granted the preliminary injunction and so [61] that's over.

Now, the purpose for an emergency temporary injunction and all of the problems attendent to that, i.e., you know, the State comes in on 18 hours notice and presents whatever evidence it can put together in those few hours—

THE COURT: A lot of times it's more candid. Isn't that the—

MR. WILLIAMS: Candor doesn't always equal completeness, with all due respect, and so for whatever reason, and I'm sure that based on the evidence that was there at that time the Court made its decision and that is over, if it's the Court's opinion, as it is our opinion, that the across-the-board ban on nudity is safe from constitutional challenge and may be applied across-the-board, then I think the remedy is to deny any further relief.

What the plaintiff seeks here now is to make that temporary ban permanent. That is what they want you to do. And I think, somebody correct me if I'm wrong, other than this less than twenty dollars worth of damages, that is all they wish you to do. They want you to declare that henceforth and forever more we cannot enforce the ban on nudity against Ms. Wyner.

That is inappropriate for some reasons we [62] talked about, for some reasons we haven't talked about, and if the Court feels that is appropriate then I think the way to proceed is to put all the preliminary issues behind us and deny the relief requested and all those things that go with it.

THE COURT: All right, thank you for your assistance. I believe, I don't think there's a need for—I don't see any material issues in dispute, at least that's our present thinking, so I think that we can deal with it or should deal with it on the summary judgment motions, and so at least for the present we are going to take it off the calendar for next week, and we will try to issue an order hopefully by the end of this week.

If you are able to settle it or resolve it that would be useful. If you both say you want a ruling, and if that's what you want, we'll do that. I think the plaintiffs, the prevailing party at least in terms of the preliminary injunction, I'm inclined at least to believe they can enforce a, their general ban on nudity

except in instances where they do take content into account, and it's not apparent to me that is what they're doing at present in trying to support their general ban, but I want to look over these, all these cases again, and we will enter an order hopefully by the [63] end of the week. But again let us know if you settle it, if there's a way for y'all to resolve it.

MR. WILLIAMS: Can we talk for just a minute sort of candidly about what we're going to do about the proposed upcoming event? And I'm not asking to have argument or ruling here, I'm not prepared for that, but we might—

THE COURT: Y'all can talk. I don't think I ought to participate in that. I don't know that, that is, my reaction is that I would rather just try to deal with the issue that is before me. Have y'all—y'all haven't dealt with this upcoming event yet, have you, in any fashion?

MR. WILLIAMS: That's correct.

MR. GREEN: Well, it was raised at the deposition by Ms. Wyner.

THE COURT: I mean she has announced that she intends to do this in the future, is that where we basically are?

MR. GREEN: Yes, Your Honor.

MR. WILLIAMS: There has been no formal discussion. She told us during her deposition, Judge, that she intended to do this thing this coming February. There has been no discussion about specific dates. We have had no formal notice. In fact, the most [64] full discussion I have heard of it was today.

We have explored the website, what is described there, not their website but another website that sort of works in conjunction with them, and what's described there doesn't look like what I am hearing about this morning, so I don't want anybody to be under the misinterpretation we have some

sort of formal notice unless what we have here today is formal notice.

THE COURT: My preference would be, I guess if I had a personal choice, it would be that y'all figure out some way to work it out, you know, and that you not, either side not push it to a final resolution. Sometimes I think those are the best answers. But I can understand why both of you might not be satisfied with that position.

I always think that forcing every issue to an ultimate judicial conclusion often isn't the best way to go. If things are left more fluid there's really a lot more room both for, sometimes for freedom, and also for the State to keep doing what it wants to do. But seems like more and more often that isn't the way things go these days. But I think there's a lot of advantages to that.

But in terms of trying to get into what she's going to do in the future, I would just as soon deal [65] with it on the record I have now and not participate in it. But again it seems to me it makes sense for y'all to talk and if you can resolve it, the case, that is great, if you can resolve what she wants to do in the future, that's wonderful too.

You did before in this settlement. The problem with those is I guess sometimes you get those hung around your neck forever.

Okay, have a good day.

(Hearing concluded.)

CERTIFICATE

I, Roger Watford, Official Court Reporter, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

Dated this 6th day of January, 2005.

/s/ Roger Watford
ROGER WATFORD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed JAN 28, 2004]

Case No. 03-80103-CIV-MIDDLEBROOKS/JOHNSON

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLIETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

FINAL JUDGMENT

THIS CAUSE comes before the Court pursuant to Fed. R. Civ. P. 58 and this Court's Order On Motions For Summary Judgment (DE 82), issued January 28, 2004, and for good cause shown. It is hereby

ORDERED AND ADJUDGED that Final Judgment shall be entered in favor of Defendants and against Plaintiffs upon the Complaint herein. The Court retains jurisdiction for the purpose of awarding costs and fees, including those expended on the Motion for Preliminary Injunction upon which Plaintiffs prevailed. It is further ORDERED, that the Clerk of Court shall CLOSE this CASE, and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, at West Palm Beach, Florida, this 28 of January, 2004.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record

No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction, but no judgment on the merits or court-enforced consent decree, is a "prevailing party" under 42 U.S.C. § 1988.

2. Whether a plaintiff who obtains a preliminary injunction that is followed by denial of a permanent injunction and judgment on the merits for defendants is a "prevailing party" under 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were then-petitioner David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and petitioner Terrence Coulliette, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park. Michael W. Sole is now the Secretary of the Department of Environmental Protection, and has been substituted for David B. Struhs as a petitioner. Plaintiffs below and respondents here are T. A. Wyner and George Simon.

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OPINIONS BELOW

The April 25, 2006 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 179 Fed. App'x 566 (Pet. App. 1a-8a). The July 17, 2006 order of the court of appeals denying the petition for rehearing en banc is not reported (Pet. App. 49a-50a). The January 28, 2004 order and opinion of the District Court for the Southern District of Florida, granting summary judgment to defendants and finding that plaintiffs were prevailing parties, is not reported (Pet. App. 23a-48a). The February 13, 2003 order of the district court granting plaintiffs' motion for a preliminary injunction (as amended on February 27, 2003) is reported at 254 F. Supp. 2d 1297 (Pet. App. 9a-22a). The August 16, 2004 omnibus order of the district court granting in part plaintiffs' motion for attorney's fees and costs is not reported (Opposition Appendix ("Opp. App.") 1a-13a).

STATUTES INVOLVED

42 U.S.C. § 1988(b) provides in pertinent part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Florida Administrative Code Rule 62D-2.014(7)(b) provides as follows:

> In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

Florida Administrative Code Rule 62D-2.014(18) provides as follows:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed

material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 25, 2006. Then-petitioner David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and petitioner Terrence Coulliette, in his official capacity as Park Manager of the John D. MacArthur Beach State Park, timely filed a petition for rehearing and rehearing en banc, which was denied on July 17, 2006.[1] Petitioners timely filed their petition for certiorari on October 16, 2006. This Court granted the petition on January 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Respondents Wyner and Simon, plaintiffs below, are not prevailing parties eligible for attorney's fees under § 1988 because they never obtained a judgment on the merits or a court-enforced consent decree. See *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 (2001). To be a prevailing party, "[a]t a

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[1] Michael W. Sole is now the Secretary of the Department of Environmental Protection, and he has been substituted for David B. Struhs as a petitioner.

minimum, the plaintiff must be able to point to a *resolution* of the dispute which charges the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis supplied). The state law whose constitutionality respondents attacked remains valid and enforceable today. Yet the courts below awarded attorney's fees to plaintiffs. Under this Court's precedent, a plaintiff who obtains a preliminary injunction but no further relief cannot be deemed a "prevailing party," because a preliminary injunction does not constitute an adjudication on the merits or judicially-enforced relief that resolves the plaintiff's legal claim. At best, a preliminary injunction is a non-binding prediction of the outcome of the claim, made in order to prevent irreparable harm while the court adjudicates its merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394-95 (1981). Due to the frequent haste and abbreviated procedures in preliminary-injunction proceedings, such orders lack preclusive effect and may be based on legal and factual error (as occurred here). Preliminary injunctions fall in the category of interim orders that touch on the merits, but do not confer prevailing-party status. See *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

Assuming *arguendo* that some preliminary injunctions confer prevailing-party status, the preliminary injunction in this case cannot. The same court that issued the preliminary injunction ultimately reversed its tentative findings and conclusions in granting summary judgment to the state defendants. Plaintiffs cannot be prevailing parties based on a preliminary injunction whose legal and factual basis is later *rejected* by the same court on its merits. And, even if the summary-judgment decision had not made clear that the preliminary injunction was the result of an incomplete record, the injunction expired by its own terms and the legal claim underlying that injunction became moot. A preliminary injunction based on a legal claim that becomes moot before its adjudication is insufficient for prevailing-party status, at

least where, as here, the claim is mooted by the passage of time and *not* by the defendants' actions.

On each of these independent grounds, the court of appeals' decision should be reversed.

STATEMENT OF THE CASE

1. *Background.* This case arises from respondent T.A. Wyner's ("Wyner") interest in appearing nude in the John D. MacArthur Beach State Park in Palm Beach County, Florida ("MacArthur Park" or "Park"). The Park is owned by the State, and operated by a state agency, the Florida Department of Environmental Protection ("Department"). Thus, the Park is subject to the rules which govern all state parks set forth in Florida's Administrative Code. This includes Rule 2D-2.014(7)(b), which requires patrons of Florida's state parks to cover their genitals, pubic areas, portions of their buttocks and, for females, breasts (hereafter "Bathing Suit Rule" or "minimum-clothing requirement").

Since 1990, Wyner has sought to appear nude in MacArthur Park in performances and demonstrations. Respondent Simon has sought to observe Wyner's nude performances and demonstrations. Pet. App. 10a, 24a; Joint Appendix ("JA") 13. In 1991, Wyner began producing and performing at the Park a play called "MacArthur: The Man, the Beach, and the Skinny-Dippers," depicting the Park's history and the State's enforcement of the Bathing Suit Rule. Pet. App. 11a, 25a. Wyner and Simon were arrested for nudity while performing this play in 1991. Those charges were later dismissed. *Id.*

In 1995, Simon filed a civil action alleging that his constitutional rights had been violated by the 1991 arrest. Pet. App. 11a, 25a. On May 12, 1995, the State settled Simon's civil action by stipulation. That stipulation stated that "nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place, and manner." JA 22. Pursuant to

this Stipulation, the State allowed Wyner's MacArthur Park play to be presented on February 19, 1996, with "placement of a bolt of cloth in a semi-circle around the area where the play will be performed," and with signs "advising beachgoers that a play will be performed within the cloth-enclosed theater which includes nudity." *Id.* at 23. During the 1996 performance, however, the participants did *not* remain behind the screen. Pet. App. 4a, 42a.

In 1998, Wyner again conducted a performance of the play. On this occasion, the nude participants stayed behind the screen. Pet App. 26a; JA 49.

In 2001, Wyner sent to the MacArthur Park manager a request that she be permitted to produce and perform the play in the nude. Attorneys for the Department indicated that she could not do so, requiring that she comply with the Bathing Suit Rule. Wyner decided not to perform the play. JA 55-56 (citing Letter to Wyner from M. Levy, Ass't Gen. Counsel, Jan. 23, 2001.).

In mid-January 2003, Wyner called Park Manager Coulliette to inform him that she intended to engage in a demonstration on February 14, 2003, during the Winter Naturist Gathering in Palm Beach County. JA 16. This demonstration would include the production of a peace symbol composed of nude bodies at the Park. On January 29, Wyner put her plans in writing, and Couliette forwarded the written description to the Bureau Chief of the Parks for that District. *Id.* at 16, 24-25.

By letter dated February 6, Coulliette informed Wyner that although her "activities are welcome during any hours the Park is open," the Department had rejected her request that she be permitted to demonstrate *in the nude*. JA 29-30. The Department stated that it did "not believe that *the nudity* planned for your activities is expressive conduct protected by the First Amendment." *Id.* at 29. (emphasis supplied). The Department further explained

> that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. *You are of course free to conduct your activities, absent the nudity. You must wear the minimal amount of clothing in the Park as required by [Rule] 62D-2.014(7)(b).*" [*Id.* (emphasis supplied).]

2. *Plaintiffs' Complaint and Motion for Preliminary Injunction.* On February 12, 2003, two days before the planned event, Wyner and Simon filed a complaint against the state defendants in the District Court for the Southern District of Florida. The complaint alleged that the State's enforcement of rules precluding nudity in plays and demonstrations violates the First and Fourteenth Amendments of the Constitution, as enforced through 42 U.S.C. § 1983. JA 18-19.[2] Wyner and Simon sought declaratory and injunctive relief prohibiting interference with all expressive activities that include non-erotic displays of nude human bodies, including the February 14, 2003 nude peace symbol, as well as damages against Coulliette individually. *Id.* at 18-19.

Simultaneously, Wyner and Simon filed an Emergency Motion for Temporary Restraining Order And/Or Preliminary Injunction, seeking to prevent the Department and the Park "from requiring plaintiff Wyner and/or other participants, to wear clothing when they participate in a Valentine's Day protest in John D. MacArthur Beach State Park." JA 32. Plaintiffs argued that applying the Bathing Suit Rule to the February 14 demonstration unconstitutionally limited their freedom of expression in a public forum and that the Rule

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[2] Originally, the complaint contained a second count under the Florida Constitution. JA 19. After defendants moved to dismiss, plaintiffs voluntarily dismissed that count, which is not at issue before this Court. *Id.* at 3 (docket entries 13, 17).

was not content-neutral because it focused on *nude* conduct. *Id.* at 32-34.

On February 13, 2003, the day after the complaint was filed and less than 24 hours before the scheduled nude peace symbol, the district court held a hearing on the motion for a preliminary injunction. Counsel for the state defendants appeared only by telephone. JA 36. She objected to the plaintiffs' use and submission of exhibits that she had not been shown in advance. See, *e.g.*, *id.* at 55, 58. The court "overrule[d] the objection because of the time constraints of a preliminary injunction or temporary restraining order." *Id.* at 56.

The court heard live testimony from Wyner who recounted the history of her nude performances in the Park, see JA 45-60. She testified that the 1998 performance of her play occurred with a screen, but stated that after that 1998 performance,

> our conclusion after having done the play within the screen was that we had ghettoized the stage area and that the general public was in fear of coming beyond the so-called line in the sand and were in fear of coming beyond that line and the screen itself for fear of their being arrested . . . and so it actually chilled the performance, the screen, and *we let DEP know that we could no longer use the screen.* [*Id.* at 49 (emphasis supplied).]

The state witness testified by telephone. The court recognized that this witness's testimony was preliminary and rushed. See, *e.g.*, JA 84 ("I don't want to put too much weight on a fellow who got put on the spot kind of at the last minute").

Based on the stipulation settling the civil lawsuit that had permitted Wyner to perform her play in 1995 with the nudity screened and warning signs posted, the court asked why that would not "solve the problem" with respect to the nude peace

symbol. JA 86. The State's counsel responded that the Constitution does not require this accommodation, and that plaintiffs "have ample room for expression if they do their same demonstration just wearing some kind of minimal bathing suit." *Id.*

3. *The District Court's Rulings On The Motion for Preliminary Injunction.* The court first ruled orally that he was going to grant the preliminary injunction. JA 93. Assuming content neutrality for purposes of the preliminary injunction ruling, the court applied the Supreme Court's test for content-neutral restrictions on free expression in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The court stated that "it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests," specifically the use of screens and signs akin to those used in the past. JA 94.

The court concluded: "[i]t bothers me, I think there are a lot of issues in this case, and *I don't like to try to decide[] issues on this quick a basis*, but I do feel like this meets the test of the injunction." JA 95 (emphasis supplied).

Later the same day, the court issued an Opinion and Order granting the motion. (The order was amended some weeks later to make non-substantive corrections. See Pet. App. 10a; JA 2.) The court made clear that it was applying the legal standard for a preliminary injunction. Pet. App. 13a-14a. The court initially stated that, assuming the restriction on nudity is unconstitutional, the public interest and the balance of harms would favor Wyner and Simon. *Id.* at 14a-15a. The court further noted that irreparable harm is established merely by the potential loss of First Amendment rights. *Id.* at 15a.

The court found that nude political speech is expressive conduct protected by the First Amendment, that the Park is a public forum, and that reasonable time, place and manner restrictions may be imposed on the exercise of First Amendment rights such as expressive nudity. Pet. App. 15a-

16a. As in its oral ruling, the court said that "[c]ontent neutrality is hereafter assumed only for purposes of this order." *Id.* at 17a.

Again applying the *O'Brien* test for assessing the constitutionality of content-neutral restrictions on free expression, the court held that the state laws at issue serve a significant government interest. Pet App. 17a-18a. But, the court believed that the record at the preliminary-injunction stage suggested that there were less restrictive alternatives to the nudity ban that would serve the State's interest, to wit, the screening and signage provisions of the 1995 stipulation resolving the civil litigation. *Id.* at 18a-19a. Based on this purported less restrictive alternative, the court decided that "[p]laintiffs have clearly satisfied the burden of persuasion of showing a likelihood of success on the merits of this case." *Id.* at 19a. The court emphasized that the State was authorized to put up screens and signs. *Id.* at 19a-20a.

The next morning the nude peace symbol production occurred without interference by the state defendants. "Plaintiffs and other participants [did] not remain[] behind the cloth screen during the nude peace symbol demonstration, and a fair reading of the record shows that Plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works." Pet. App. 4a; see also JA 108. In addition, the participants swam nude following the peace symbol display. See Defs. Opp. to Pls. Mot. for Summ. J. at 6 (Dec. 29, 2003) (citing Wyner Dep. 99).[3]

4. *The District Court's Grant of Summary Judgment and Final Judgment to Defendants.* The case proceeded to the adjudication of the merits of the complaint. After discovery, both parties filed motions for summary judgment.

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[3] A second grade class was unable to conduct its scheduled beach visit that day as a result of these activities. See JA 116; Defs. Opp. to Pls. Mot. for Summ. J. at 7 (citing Sands Dep. at 15, 18).

Plaintiffs' motion for summary judgment recited the text of the district court's opinion and order granting the preliminary injunction, and made the same legal arguments that had been made in support of the preliminary injunction. See Pls. Mot. and Mem. in Supp. of Mot. for Summ. J., (Dec. 8, 2003). In response, the state defendants argued that as of 2000, Wyner had declared that she would not comply with the less restrictive time, place and manner restrictions (the screening and signs) previously applied to her play because the screen was "'hugely chilling.'" See Defs. Opp. to Pls. Mot. for Summ. J., at 4 (citing TRO Tr. 20 ("we let DEP know that we could no longer use the screen") (JA 49), and Wyner Dep. 51-52). The state defendants also pointed to (i) Wyner's deposition testimony that she did not understand the purpose of the screen, *id.* at 6 (citing Wyner Dep. 42), (ii) another participant's testimony that Wyner and he "'decided to ignore the presence of the screen,'" *id.* (citing Schloss Dep. 22), and (iii) that fact that after the nude peace symbol was formed, all participants went into the water nude, *id.* (citing Wyner Dep. 99–100). Based on this evidence, the state defendants argued that the court's putative less restrictive alternative (the screens and signs) did not and could not serve the State's purposes.

The district court declined to decide whether the preliminary injunction prohibiting defendants from interfering with the February 14, 2003 demonstration had been properly issued, instead holding that the underlying legal claim had been mooted by the passage of time. Pet. App. 34a. But, the court held that, despite plaintiffs' temporary success, "[p]laintiffs are unable to show *actual* success on the merits." *Id.* at 35a (emphasis supplied). Applying the *O'Brien* test, the court found, contrary to its view in the order granting the preliminary injunction, that "a complete ban on nudity is necessary," and that there were no less restrictive means to achieve the State's important interests because "[p]ark authorities [are] unable to ensure that those engaged in the expressive conduct stay[] behind the screen." *Id.* at 42a

Moreover, the court held that, because "those engaged in expressive conduct at the park are free to continue with their conduct wearing thong bathing suits," "'any effect on the overall expression is de minimis." *Id.* (quoting *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 294 (2000)).[4]

The district court expressed its hope that plaintiffs would continue using the park, but "not in the nude," and entered final judgment for the state defendants. Pet. App. 46a; JA 145.[5]

5. *The District Court's Decision That Plaintiffs Are Nonetheless Prevailing Parties.* Despite its decision on the merits, the district court held that, because Wyner and Simon had obtained a preliminary injunction and performed the nude peace symbol on February 14, 2003, they were "prevailing parties." Opp. App. 2a-4a. The court rejected the defendants'

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[4] The court also held that Florida Administrative Code Rule 62D-2.014(18) (whose constitutionality was not addressed in the preliminary-injunction order) does not unconstitutionally restrict free expression, and rejected plaintiffs' claim against Coulliette individually. Pet. App. 43a-45a, 31a-32a.

[5] By the time the district court entered summary judgment for the state defendants, it erroneously believed that it granted the preliminary injunction based on its belief that defendants might not have been administering the minimum-clothing requirement in a content-neutral fashion. Pet. App. 47a n.2. As the court of appeals pointed out, however, the district court expressly assumed that the state had acted in a content-neutral manner for purposes of issuing the preliminary injunction. *See id.* 6a-7a n.4. Thus, in assessing whether the summary-judgment decision makes clear that the preliminary injunction was based on a legal or factual error, the relevant question is whether the preliminary injunction was based on a likelihood that the minimum-clothing requirement was unconstitutional because a less restrictive alternative (screens and signs) existed. The decision on summary judgment makes clear that the decision granting the preliminary injunction was erroneous and that the injunction would not have been granted had the law and facts been fully developed. *See infra* at Part II.A.

arguments that plaintiffs did not obtain relief on the merits and thus could not be prevailing parties. *Id.* at 3a-4a. The court awarded attorney's fees of $25,924.50 to plaintiffs for obtaining the preliminary injunction. *Id.* at 13a.

The Eleventh Circuit affirmed. The court found that the order granting the preliminary injunction was a ruling on the merits, and thus held that Wyner and Simon were prevailing parties entitled to attorney's fees under 42 U.S.C. § 1988. Pet. App. 2a-3a. The court explained that Wyner and Simon were prevailing parties because they "were able to show a substantial likelihood of success at the preliminary injunction stage, [although] they were unable to achieve actual success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative." *Id.* at 7a-8a n.7. Like the district court, the appellate court declined to address the state defendants' challenge to the preliminary injunction, finding that the order was moot. *Id.* at 5a n.1.

The state defendants' petition for rehearing and rehearing en banc was denied. Pet. App. 49a.

SUMMARY OF ARGUMENT

In *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 (2001), this Court determined that a prevailing party is one who receives an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." These types of judgments "create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* (quoting *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). Plaintiffs received a preliminary injunction, but did not prevail on the merits of their underlying legal claim. In fact, the preliminary-injunction order was followed by a decision on summary judgment that *rejected* the legal basis for that injunction. For reasons illustrated by this case, a plaintiff

should not be deemed a prevailing party if he or she obtains a preliminary injunction, but never receives a judgment on the merits, a court-ordered consent decree, or analogous relief that resolves the claim at issue.

First, under this Court's cases, a plaintiff who receives a preliminary injunction has not obtained a judgment on the "*merits*" or any "*material* alteration" in the "*legal relationship* of the parties." In the federal courts, the decision whether to grant a preliminary injunction involves consideration of the likelihood of success on the merits, the irreparable nature of potential harm, and the balance of public and private harms. The order involves only a *prediction* of success on the merits and a *temporary* barrier to a defendant's ability to enforce its laws. This does not change the parties' *legal relationship* and clearly does not resolve any claim. Indeed, the factual and legal analysis in a preliminary injunction order lacks preclusive effect and does not even establish law of the case. Moreover, as this case exemplifies, the proceedings on preliminary injunctions are often conducted in circumstances that deprive the defendant of a full opportunity to present its legal and factual defense on the merits. See *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 394-95 (1981). This Court's cases denying prevailing-party status to plaintiffs who obtain favorable interim orders addressing the merits strongly indicate that a preliminary injunction does not confer that status. See, *e.g.*, *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987).

The courts of appeals' test for determining when a plaintiff who obtains a preliminary injunction is a prevailing party – which requires an analysis of whether the injunction preserves the status quo or is merits-based – is inconsistent with this Court's jurisprudence about the nature of preliminary injunctions and the effect of interim decisions on prevailing-party status. This imprecise test is also practically unworkable, producing wholly inconsistent results.

Second, even if there were circumstances in which a plaintiff could become a prevailing party simply by obtaining a preliminary injunction, those circumstances are not present here. A plaintiff who has obtained a preliminary injunction cannot be a prevailing party if the legal and factual underpinnings of that injunction are subsequently rejected on the merits. The trial court's summary-judgment decision rejected the bases for its initial preliminary-injunction order, and plaintiffs thus cannot be deemed prevailing parties based on that order.

Third, even assuming *arguendo* that the summary-judgment decision had not made clear that plaintiffs were unsuccessful, the preliminary injunction still could not confer prevailing-party status because any claim that the nudity ban was unconstitutional as applied to the February 14, 2003 demonstration became moot before it could be adjudicated on its merits. A claim that becomes moot before judgment on its merits cannot give rise to prevailing-party status, at least in circumstances where, as here, the case is not mooted by affirmative acts of the defendants. In this case, the state defendants vigorously disputed plaintiffs' claim that the nudity ban was unconstitutional as applied to the February 14, 2003 demonstration, but that claim was mooted by the passage of time. In this context, the preliminary injunction does not confer prevailing-party status.

Finally, it would not serve the purposes of the attorney's fees statute to confer prevailing-party status on respondents. The rules of law urged by petitioners will not discourage the filing of meritorious claims.

ARGUMENT

PLAINTIFFS ARE NOT PREVAILING PARTIES WITHIN THE MEANING OF 42 U.S.C. § 1988.

I. A PRELIMINARY INJUNCTION WITHOUT MORE CANNOT CONFER PREVAILING-PARTY STATUS.

A. A Preliminary Injunction Is Not An Adjudication On The Merits Or A Judicially-Enforced Resolution Of A Legal Claim.

1. In *Buckhannon*, this Court distilled from the attorney's fees statute and its cases a definition of prevailing-party status. This Court's review of its cases confirmed that a plaintiff is a prevailing party only if he has "'prevailed on the *merits* of at least some of his claims.'" 532 U.S. at 603. (quoting *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (emphasis supplied)). "At a minimum, the plaintiff must be able to point to a *resolution* of the dispute which changes the relationship between itself and the defendant." *Tex. State Teachers Ass'n*, 489 U.S. at 792 (emphasis supplied). See also *id.* ("[o]ur '[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits* of his claim before he can be said to prevail'" (second alteration in original) (quoting *Hewitt*, 482 U.S. at 760) (emphasis supplied). Thus, an award of fees is appropriate "only in th[e] event that there [has] been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Hanrahan*, 446 U.S. at 758; *id.* at 757 (quoting H.R. Rep. No. 94-1558, at 8 (1976)).[6]

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[6] The phrase "substantial rights" is also relevant in harmless-error review. *See, e.g.*, 28 U.S.C. § 2111 (appellate courts are to disregard "errors or defects which do not affect the substantial rights of the

Based on this analysis, the Court identified two categories of prevailing parties: plaintiffs who receive judgment on the merits, and those who obtain a judicially-enforceable consent decree. See *Buckhannon*, 532 U.S. at 604 & n.7 (characterizing a consent decree as "entail[ing] judicial approval and oversight").[7] A party who obtains a preliminary injunction has *temporarily* prevented the defendant from enforcing its laws based, in part, on a *prediction* about the merits, but has not received judgment on the merits, a consent decree, or any other "'*material alteration* of the *legal relationship* of the parties,'" and thus has not prevailed. *Id.* (emphasis supplied) (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792-93).

Examination of this Court's cases involving plaintiffs who obtain interim orders addressing the merits reveals that such plaintiffs are not prevailing parties. In each case, the Court concluded that the plaintiff was not a prevailing party for reasons that are instructive here.

Most recently, in *Buckhannon*, the plaintiff residential care facility received a cease-and-desist order requiring it to close because of a violation of West Virginia's "self-preservation" law. The facility sued the state, seeking declaratory and injunctive relief, and obtained a stay, 532 U.S. at 600-01, "an interim order allowing Buckhannon to remain open without

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parties"). In that context, an error affects a defendant's substantial rights if it has "a prejudicial effect on the *outcome* of a judicial proceeding." *See United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004) (emphasis supplied). Similarly, in deciding whether a plaintiffs' substantial rights have been violated, which could make that plaintiff a prevailing party, a court should examine the proceeding's outcome. A preliminary injunction does not determine substantial rights because its legal and factual bases lack preclusive effect in the subsequent merits decision of the underlying claim. *See infra* at 21.

[7] In *Buckhannon*, this Court noted but did not decide the question whether a private settlement incorporated into the order of dismissal (not involved here) could also confer prevailing-party status. *See* 532 U.S. at 604 n.7.

changing the individual plaintiffs' housing and care" pending the outcome of the litigation. *Id.* at 621 (Ginsburg, J., dissenting). Subsequently, the state eliminated the "self-preservation" requirement and mooted the case. The facility sought attorney's fees.

Rejecting the "catalyst theory" for attorney's fees, this Court held that a plaintiff whose lawsuit causes a voluntary change in a defendant's conduct has not received the kind of judicial merits determination that confers prevailing-party status because such a plaintiff has not obtained a material alteration in the parties' legal relationship. See *id.* at 605 (voluntary behavioral change "lacks the necessary judicial *imprimatur*" to create prevailing-party status). While the Court did not expressly state that the interim stay – allowing the facility to continue operating during the litigation – was insufficient to make the facility a prevailing party, this is a logical implication of its decision. An interim judicial order such as a stay does not confer prevailing-party status, even if it has temporary, real-world consequences, because it does not determine the legal merits of the claim, resolve the claim through a judicially-enforced consent decree, or materially alter the parties' legal relationship. The rule should be the same for a preliminary injunction.[8]

Even leaving aside the stay, *Buckhannon*'s logic suggests that a plaintiff who receives only a preliminary injunction is not a prevailing party. *Buckhannon* held that a plaintiff who

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[8] The *Buckhannon* dissent would have deemed the facility a prevailing party *not* because it obtained a stay pending litigation, but because at the end of the day, Buckhannon's lawsuit caused the state to amend its laws, terminating the controversy between the parties and permanently giving the facility the real-world outcome it sought. *See* 532 U.S. at 624 (Ginsburg, J. dissenting). Nothing in the dissent's reasoning would support finding prevailing-party status based on a preliminary injunction providing *temporary* relief, especially where, as here, the state defended its law on the merits and ultimately prevailed. *See infra* at Part II.A.

does not receive a determination on the merits or other judicially-enforced relief resolving its claim is not a prevailing party even if the plaintiff's lawsuit causes a change in a defendants' conduct. A "catalyst" plaintiff obtains a *permanent* change in the defendant's conduct by persuading the defendant voluntarily to alter its conduct, yet this was deemed insufficient to confer prevailing-party status. A plaintiff who obtains a preliminary injunction has done even less. That plaintiff obtains only a *temporary* change in the defendant's conduct, a prediction of ultimate success on the merits (weighed with potential irreparable harm and the public interest) having no binding effect, and continuing litigation of the claim. If a catalyst plaintiff is not a prevailing party, surely a plaintiff who obtains a preliminary injunction is not.

Further, even before *Buckhannon*, this Court had held that interim judicial rulings that address but do not finally determine the merits of a plaintiff's claim do not confer prevailing-party status. In *Hewitt* v. *Helms*, 482 U.S. 755, Helms sued prison officials, alleging that they had violated his due process rights. In an interlocutory appeal, the court of appeals concluded that Helms's due process rights were violated and remanded with instructions to enter summary judgment for Helms unless the defendants established immunity. On remand, the district court granted judgment for defendants on grounds of immunity. Helms sought attorney's fees, which the appellate court authorized, finding that Helms was a prevailing party because the appellate holding that his constitutional rights were violated was a "form of judicial relief" akin to a declaratory judgment. See *id.* at 760.

This Court reversed. It held that treating the appellate court's legal holding as sufficient to confer prevailing-party status would "deprive[] the defendant of valid defenses to a declaratory judgment to which he is entitled." *Id.* at 762. Thus, *Hewitt* makes clear that a judicial ruling addressing some component of the merits that does not become an actual

judgment on the merits or other court-enforced resolution of the plaintiff's claim is *insufficient* to confer prevailing-party status. Like a stay and a quasi-declaratory judgment, a preliminary injunction is an example of an interlocutory ruling that addresses an aspect of, but does not determine, the merits of the plaintiffs' claim.

A judicial ruling cannot confer prevailing-party status simply by touching on the merits of the claim or temporarily preventing the state from enforcing its laws against a plaintiff. It must instead resolve a legal claim favorably for the plaintiff. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against . . . on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). See also *Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992). A preliminary injunction does not fulfill this requirement.

2. An examination of the legal characteristics and consequences of a preliminary injunction confirms that such an order is not a determination of the merits that results in prevailing-party status.

First, the inquiry that determines whether a plaintiff is entitled to a preliminary injunction is materially distinct from the inquiry that determines whether a plaintiff is entitled to judgment on the merits. "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).[9] Thus, although likelihood of success on the merits is one factor that is considered, a decision to grant such interim

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[9] The Eleventh Circuit's test for issuing a preliminary injunction is in accord with this standard. *See, e.g., Burr & Forman* v. *Blair*, 470 F.3d 1019, 1031 n.32 (11th Cir. 2006).

relief is *not* "tantamount to [a] decision[] on the underlying merits." *Camenisch*, 451 U.S. at 394. As this case aptly demonstrates, a plaintiff who initially appears likely to succeed on the merits – based on the limited record available at the preliminary-injunction stage, see *infra* at 21-23 – may *not* succeed once the evidence is fully presented and considered. Accordingly, "it [is] improper[] [to] equate[] 'likelihood of success' with 'success.'" *Camenisch*, 451 U.S. at 394.

Courts of appeals routinely analyze preliminary-injunction factors on a sliding scale, so that a greater risk of irreparable injury justifies an injunction based on a lesser showing of possible success on the merits.[10] Indeed, this balancing of interests is inherent in the analysis of a preliminary injunction, and an injunction may issue with respect to claims with vastly different "likelihoods of success" depending upon the risk and type of irreparable injury. Moreover, courts often place a thumb on the judicial scale in favor of preliminary injunctive relief in cases (like this one) that involve the First Amendment, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).[11] This balancing process is *not* a determination of a claim's actual merit.

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[10] *See, e.g., Fla. Med. Ass'n* v. *U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979) ("a sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits"); *FoodComm Int'l* v. *Barry*, 328 F.3d 300, 303 (7th Cir. 2003) (same); *Serono Labs., Inc.* v. *Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (same); *Big Country Foods, Inc.* v. *Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (same).

[11] In some circuits, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First

Second, the general rule is that a preliminary injunction lacks preclusive consequences, confirming that such an order is not a merits determination akin to a judgment on the merits or a court-enforced consent decree. "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Camenisch*, 451 U.S. at 395; see also *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 681-82 (1951) (independent preliminary proceedings for interlocutory relief do not foreclose a later proceeding on the merits). Thus, the doctrines of res judicata, collateral estoppel, and law of the case do not apply to the factual and legal underpinings of a preliminary injunction. See, *e.g.*, *Adams* v. *City of Chicago*, 135 F.3d 1150, 1153 n.2 (7th Cir. 1998) (no collateral estoppel effect); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4445 (2d ed. 2002) (no preclusive effect in other proceedings); *id.* at § 4478.5 ("[r]ulings – predictions – as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case").

Third, a preliminary injunction does not confer prevailing-party status because it is the product of a truncated procedure. This Court has recognized that prevailing-party status should not be awarded unless the defendant had a full and fair opportunity to mount a defense. See *Graham*, 473 U.S. at 168 (declining to award fees in part because the defendant had not yet had an "opportunity to present a defense").

Hewitt, described *supra* at 18-19, illustrates this point. There, an appellate court ruled that Helms was a prevailing

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Amendment claim." *Sammartano* v. *First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotation marks omitted). *See also Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 301-04 (D.C. Cir. 2006) (describing circumstances in which a party alleging a violation of the First Amendment "per se satisfies the irreparable injury requirement of the preliminary injunction calculus").

party because it had found that Helms' constitutional rights were violated on interlocutory review. See 482 U.S. at 760. This Court nonetheless held that treating that interlocutory decision as a judgment on the merits would "deprive[] the defendant of valid defenses to a declaratory judgment to which he is entitled," including equitable defenses. *Id.* at 762. Under *Hewitt*, a defendant must receive a full opportunity to litigate the merits of a claim before a plaintiff is deemed a prevailing party.

That prerequisite is not satisfied in a preliminary-injunction proceeding because of the substantive and "significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394. "[T]he parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Id.* at 396.

For all these reasons, the nature and legal consequences of a preliminary injunction demonstrate that a plaintiff who obtains such relief is not a prevailing party.

3. From this analysis, it logically follows that plaintiffs here are not prevailing parties. Plaintiffs received a preliminary injunction under the established standard for injunctive relief (Pet. App. 13a-14a), but did not receive a favorable ruling on the merits of their claim. The court did not decide the ultimate merits of the plaintiff's First Amendment claims until, on summary judgment, it rejected them. Indeed, it would have been inappropriate for the court to do so based on the limited proceedings that preceded entry of the preliminary injunction. See *Camenisch*, 451 U.S. at 395. Plaintiffs did not prevail.

The proceedings here also exemplify the limitations inherent in emergency proceedings. Plaintiffs filed their complaint and motion for a preliminary injunction two days before the February 14, 2003 nude peace symbol demonstration. JA 1.

The day before the demonstration, the district court held a hearing, at which counsel for petitioners participated only by telephone. *Id.* at 2, 36. The State's counsel objected to exhibits she had not reviewed and to the absence of a full context for letters that were admitted, but the court overruled those objections in light of the exigency of the matter. See *supra* at 7. The court noted repeatedly during the hearing that time constraints prevented a full hearing or analysis of the facts. See *supra* at 7-8. These concerns were borne out by events. Because of the expedited nature of the hearing, the state defendants were not prepared to present certain evidence or conduct cross-examination that became relevant (*e.g.*, evidence about whether the signs and screens that were proposed actually were a less restrictive alternative to the ban). In contrast, on summary judgment, the State presented its evidence and the court agreed that the screens and signs were *not* a less restrictive alternative to enforcement of the Bathing Suit Rule and entered judgment for the state defendants. Pet. App. 42a-43a.

Any fair reading of the transcript from the preliminary-injunction hearing and the contrasting treatment of the same issue at the summary-judgment stage demonstrates that interim relief was granted in this case after expedited proceedings with limited evidence, and that the state defendants lacked a full and fair opportunity to vet assumptions and present their defenses. This case thus illustrates why it is fundamentally unfair to treat plaintiffs as prevailing parties entitled to attorney's fees solely because they have obtained a preliminary injunction. See *Camenisch*, 451 U.S. at 395; *Hewitt*, 482 U.S. at 762.

B. A Legal Rule Classifying Some Preliminary Injunctions As Merits-Based And Thus Sufficient For "Prevailing Party" Status Is Inconsistent With This Court's Precedents And Unworkable.

1. Relying largely on the arguments made *supra*, the Fourth Circuit has adopted a bright-line rule that a plaintiff

who obtains only a preliminary injunction is not a prevailing party. See *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). Other circuits, however, have concluded that some preliminary injunctions are sufficiently merits-based to confer prevailing-party status, and have attempted to distinguish such "merits-based" injunctions from "status quo injunctions" that do not confer prevailing-party status.

As explained *supra*, this Court's cases demonstrate that neither the fact that a preliminary injunction touches on the merits nor the fact that it has a temporary real-world effect (preventing the defendant from enforcing its law) is sufficient to confer prevailing-party status. Nor does the combination of these characteristics (a merits prediction plus a temporary change in conduct) overcome the deficiencies of each and amount to a "material alteration in the parties' legal relationship."

The difficulty with all efforts to distinguish preliminary injunctions that preserve the status quo from merits-based injunctions is that a "likelihood of success on the merits" is *not* actual success on the merits, and "the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 394-95. Accord 11A Charles Alan Wright, Arthur R. Miller & Mary Kate Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995).

In addition, measuring the degree to which an order granting a preliminary injunction rests on a merits assessment (as opposed to the assessment of harms and the public interest) is problematic:

> How much of a "likelihood of success" is enough? Will a 75 per cent likelihood do? How about 50 per cent with a strong public interest showing to boot? [A court has] to first collapse the standard four-factors test for granting preliminary injunctive relief into one factor – likelihood of success – and then equate likelihood of success with success in order to declare [a plaintiff a]

> "prevailing part[y]." [*Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 957 (D.C. Cir. 2005) (Henderson, J., dissenting).]

Treating a judicial determination as if it were on the merits because it makes a *prediction* about the merits (based only on limited evidence) misses the mark.

Further, "[t]he concept *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning." *Developments in the Law – Injunctions*, 78 Harv. L. Rev. 1055, 1058 (1965). Precisely what state of reality counts as the status quo can vary significantly depending on the moment the court identifies as "the last uncontested status which preceded the pending controversy." *Westinghouse Elec. Corp.* v. *Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958); see also 11A Wright, *supra* § 2948 ("[i]t is often difficult to determine what date is appropriate for fixing the status quo").

2. Even so, some courts attempt to conduct a case-by-case inquiry to determine whether a plaintiff who obtains an injunction is a prevailing party. These courts examine whether a preliminary injunction was granted principally to preserve the status quo or largely based on an assessment that plaintiffs were likely to succeed on the merits of their claims. For example, the Second and Sixth conduct "'close analysis of the decisional circumstances and reasoning underlying the grant of preliminary relief.'" *LaRouche* v. *Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Webster* v. *Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1998)). "[A]n unambiguous indication of probable success on the merits" would be sufficient to permit attorney's fees, whereas "merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff" would not. *Webster*, 846 F.2d at 1036. This test posits an inquiry into precisely how likely plaintiff was to prevail on the merits and how much of the balance of harms and the public interest affected the four-part balancing

process. In addition to being inconsistent with this Court's decisions, the test produces unpredictable results.

For example, in *LaRouche*, plaintiffs obtained a preliminary injunction allowing them to appear on a ballot as presidential candidates, but the Second Circuit denied them attorney's fees because the interim relief was a "procedural maintenance of the status quo" that did "not depend solely or even primarily on a consideration of the merits." 20 F.3d at 72 (internal quotation marks omitted). In contrast, in *Haley* v. *Pataki*, 106 F.3d 478 (2d Cir. 1997), plaintiffs were awarded a preliminary injunction preventing the Governor of New York from withholding pay from state employees, and the Second Circuit allowed fees because plaintiffs showed a "likelihood of success on their claim." See *id.* at 480. In both cases, the court was required to find a likelihood of success on the merits, and there is no way to discern from the courts' opinions why the *Haley* plaintiffs were more likely to succeed than the *LaRouche* plaintiffs, or why the preliminary injunction in *LaRouche* was more focused on the status quo than that in *Haley*.

In *Webster*, 846 F.2d at 1036-37, the Sixth Circuit rejected the district court's conclusion that the "'probability of plaintiffs' success in this action is very great'" as merely "making a record" through "rote recitation of one of the factors that must underlie . . . preliminary injunctive relief," and denied attorney's fees based on its belief that the district court had actually placed "greater emphasis [on] the threat of irreparable harm." *Id.* On the other hand, in *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1554, 1558 (11th Cir. 1987), the court of appeals stated, without explanation, that a preliminary injunction *was* based on the merits and entitled the plaintiff to fees, even though the district court's order was based on both irreparable injury (*i.e.*, the harm to the church from forbidding religious solicitation activity) and the likelihood of success on the merits (*i.e.*, the "well-established" rule "that religious solicitation is protected activity, and the threat of criminal prosecution effectively

chills that activity"). As the contrast between the views of the courts in these cases makes clear, it is extremely difficult to predict whether a preliminary injunction is deemed merits-based or intended to preserve the status quo.

This case further illustrates the difficulties in distinguishing status quo and merits-based injunctions. The judge appears to have believed that the preliminary injunction restored the parties to "the last uncontested status which preceded the pending controversy" – *i.e.*, Wyner was permitted to engage in nude expressive activities with a screen and signs. See, *e.g.*, Pet. App. 18a. This would suggest that the judge believed he was preserving the status quo. Moreover, the district court based the preliminary injunction in some substantial part on Wyner's claim of irreparable harm (which the Court presumed because the complaint alleged violations of First Amendment rights). *Id.* at 15a. The court also found a likelihood of success on the merits because of the putative less restrictive alternative, but the opinion is wholly unclear about the relative importance of the plaintiffs' showing of a likelihood of success. Indeed, the district court several times indicated its discomfort with the expedited proceeding and the difficulty of the issues, and ultimately rejected the bases of the preliminary injunction. See *supra* at 7-8.

In these circumstances, the district court should have concluded that the injunction was *not* merits-based. But it did not.[12]

3. Finally, efforts to distinguish status quo and merits-based injunctions are inconsistent with this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). More satellite litigation is

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[12] The Eleventh Circuit simply stated without more that the injunction was merits based, so it is not possible to discern the basis for its conclusion. *See* Pet. App. 3a.

inevitable if a plaintiff can try to show prevailing-party status because the preliminary injunction was primarily "on the merits." And, as the current practice in some courts of appeals reveals, the process is "clearly not a formula for ready administrability." *Buckhannon*, 532 U.S. at 609-10 (internal quotation marks omitted). Instead, it will "ensur[e] that the fee application will spawn a second litigation of significant dimension." *Tex. State Teachers Ass'n*, 489 U.S. at 791.

In contrast, the bright-line approach suggested by *Camenisch* is clear: a preliminary injunction never amounts to a merits determination, because preliminary injunctions are intended to preserve the status quo pending a merits decision. It is excessively complicated to parse the reasoning behind each preliminary injunction to separate those that preserve the "status quo" (which is the ultimate purpose of *all* preliminary injunctions) from others based on the probable merits of the plaintiff's claim. Any legal rule encouraging such line-drawing should be rejected.

II. ASSUMING THAT CERTAIN PRELIMINARY INJUNCTIONS CAN SUPPORT PREVAILING-PARTY STATUS, THIS ONE CANNOT.

A. Plaintiffs Cannot Be Prevailing Parties Based On A Preliminary Injunction Whose Predicates Are Later Rejected On The Merits.

Even if this Court were to decide that certain preliminary injunctions can support prevailing-party status, and that a "merits-based injunction" was issued here, respondents are not prevailing parties. This Court should hold that a plaintiff who obtains a preliminary injunction is *never* entitled to fees when that temporary success rests on premises rejected in a subsequent decision on the merits of plaintiff's claims.

A defendant who has been "completely successful on all issues" is not required "to pay the unsuccessful plaintiff's

legal fees." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 (1983).[13] And, a plaintiff is not entitled to prevailing-party status and attorney's fees based on a judgment that becomes moot before it is reviewed. See *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (a court order vacating a judgment on mootness grounds prevents a party from relying on that judgment for relief, and thus the party cannot "prevail" on its claim); see also *infra* Part II.B. Finally, as explained *supra* at 16-19, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" *Hewitt*, 482 U.S. at 763. These decisions lead to the conclusion that a plaintiff who obtains a preliminary injunction based on factual and legal determinations later *rejected* by the court in entering summary judgment for the defendant is not a prevailing party.

Every court of appeals that has considered the question has squarely held that a party may not recover attorney's fees for a preliminary injunction or, indeed, a favorable final judgment, that is reversed, dissolved, or undercut by a subsequent decision. "[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it." *Palmer* v. *City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986). This is because "it is [not] possible to win by losing," and "[t]he civil

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[13] In civil rights litigation, attorneys' fees may sometimes be allowed *pendente lite*, before obtaining formal relief after judgment on the merits. Such interim awards, however, assume a final favorable adjudication or judicially-enforceable relief on the merits. Indeed, when attorney's fees have been awarded and paid on the basis of a judgment that is later reversed, the attorney must return the fees to the payor. *See, e.g.*, *Dale M. ex rel. Alice M.* v. *Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002) (it is professional misconduct for an attorney "to hold on to a fee, obtained by a court order, to which she is not entitled because the order has been reversed").

rights attorney's fees statute does not reward a plaintiff who brings an unmeritorious suit." *Id.* at 1321, 1323.[14]

The Eleventh Circuit's decision is wholly inconsistent with the thrust of this authority. It accepted the district court's view that the preliminary injunction was granted on plaintiffs' claim that the State's prohibition on nudity was unconstitutional *as applied* to the February 14, 2003 demonstration, while summary judgment was granted on the purportedly different claim that the state's nudity ban was facially unconstitutional because it covered non-erotic nudity in expressive activity in the Park. Based on this division, the court below concluded that plaintiffs had prevailed on a claim. This was error.

The legal analysis that resulted in the court's determination that plaintiffs were entitled to a preliminary injunction (the application of the *O'Brien* test) was identical to the legal analysis that resulted in the court's summary-judgment decision. The latter decision rejected the same claim that underlay the preliminary-injunction motion – that the state

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[14] *See, e.g., Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 195 (1st Cir. 1996) (when a judgment is reversed, "that party is no longer a 'prevailing party'"); *Clark* v. *Twp. of Falls*, 890 F.2d 625, 626 (3d Cir. 1989) (same); *Pressey* v. *Patterson*, 898 F.2d 1018, 1026 (5th Cir. 1990) (same); *Pottgen* v. *Mo. State High Sch. Activities Ass'n*, 103 F.3d 720, 723-24 (8th Cir. 1997) (same). *See also Smith* v. *Univ. of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980) (applying this rule to a preliminary injunction later reversed); *Doe* v. *Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982) ("plaintiffs who have obtained a preliminary injunction but ultimately do not succeed on the merits may not be considered prevailing parties"); *NAACP* v. *Detroit Police Officers Ass'n*, 46 F.3d 528, 529-30 (6th Cir. 1995) (same); *Ward* v. *County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986) (same); *Dahlem by Dahlem* v. *Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1512, 1514 (10th Cir. 1990) (plaintiff was not a "prevailing party" because the reversal of a companion case raising the same legal issues demonstrated that she would have lost on the merits).

law banning nudity in parks was unconstitutional as applied to non-erotic nudity in expressive conduct.

Specifically, the district court believed initially that there was a less restrictive alternative to enforcement of the Bathing Suit Rule, but subsequently concluded that there was not.[15] In addition, the court concluded initially that the Rule significantly restricted expression, but later found the restriction *de minimis*. Indeed, the court flatly stated that, although it appeared in February 2003 that there was a *likelihood* that respondents would eventually prevail on the merits, they were "unable to show *actual* success on the merits." Pet. App. 35a (emphasis supplied).[16]

For these reasons, if the Court concludes that some preliminary injunctions can support prevailing-party status, it should hold that a plaintiff is *not* a prevailing party where, as here, she obtains a preliminary injunction whose underpinnings are rejected in the subsequent adjudication of the merits of the litigation.

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[15] The preliminary injunction was, in fact, based largely on the inadequacy of the factual record and the state defendants' failure to anticipate that the district court might find a less restrictive alternative to a complete ban on nudity. Wyner testified at the February 13, 2003 hearing that she believed the use of the screen "ghettoized" nude expression, and that she had informed the Department that she could no longer use the screen. JA 49. But the district court plainly did not understand that Wyner and the others in the peace symbol would not abide by the cloth screen that constituted the "less restrictive alternative" authorized by the court. Once the court realized that fact, it determined *that* no less restrictive alternative existed. Pet. App. 41a-42a. The purposes of fee shifting statutes are not served by a rule that allows a party to prevail because the district court lacked a full picture of the facts or law.

[16] To be clear, the issue is not whether the injunction was an abuse of discretion and thus would have been vacated on appeal (an issue which became moot before it could be assessed), but instead whether the district court's subsequent merits decision rejects the findings that were the basis of the injunction.

B. Interim Orders That Are Mooted Prior To A Final Judgment Cannot Serve As The Basis For Attorney's Fees Under § 1988.

Even assuming that the preliminary injunction was unaffected by the subsequent summary-judgment ruling, plaintiffs here are not prevailing parties. The preliminary-injunction order was mooted by the passage of time once the February 14, 2003 demonstration ended, and was thus rendered unreviewable.[17] Granting attorney's fees on the basis of such a ruling contravenes this Court's teaching that an order mooted before a final judgment or consent decree does not confer prevailing-party status, particularly where the claim is not mooted by the defendant's affirmative acts.

As explained *supra* at 17, *Buckhannon* supports the contention that interim relief that is mooted prior to a final judgment cannot justify the shifting of attorney's fees. There, the interim stay of enforcement was mooted along with the rest of the lawsuit when the state voluntarily repealed the challenged statute. 532 U.S. at 601. This Court held that because the state's voluntary mooting of the lawsuit prevented the entry of a final judgment, it foreclosed any "corresponding alteration in the legal relationship of the parties," and the facility was ineligible for fees. *Id.* at 605. That the facility enjoyed the interim stay for over two years did not deter this Court from ruling that it was not a prevailing party. *Id.* Although the Court did not expressly address the effect of the stay's becoming moot, its holding suggests that where a case is mooted prior to final judgment, interim orders provide no basis for attorney's fees.

Although this Court has not yet expressly held that a preliminary injunction mooted before adjudication of the

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[17] *See* Pet. App. 5a n.1 ("[d]efendants' challenges to the underlying preliminary injunction are moot because the injunction was about a finite event that occurred and ended on a specific, past date").

underlying claim cannot confer prevailing-party status, it has determined that a plaintiff is not a prevailing party based on an interim order mooted before judgment through no affirmative act of the defendant. In *Lewis*, this Court held that "[a]n order vacating the judgment on grounds of mootness would deprive [a plaintiff] of its claim for attorney's fees under 42 U.S.C. § 1988 . . . because such fees are available only to a [prevailing] party." 494 U.S. at 480. In that case, the district court had granted summary judgment in favor of the plaintiff bank, which was challenging an allegedly unlawful state statute. During the pendency of the state defendant's appeal, however, Congress enacted a related provision that authorized the state law, thereby vitiating the bank's claims. *Id.* at 476-77. This Court held that, "[s]ince the judgment below is vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, [the plaintiff] was not, at that stage, a 'prevailing party' as it must be to recover fees under § 1988." *Id.* at 483. See also *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (rejecting attorneys fees under § 1988 because "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever").[18]

The preliminary injunction at issue – which is the sole basis for the plaintiffs' assertion of prevailing-party status – was moot due to the passage of time before the district court could issue a final judgment on the merits of the underlying claim. Thus, it cannot be the predicate for attorney's fees under § 1988.

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[18] Because the issue was not briefed in the courts below, the *Lewis* Court declined to address "[w]hether [the plaintiff] can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted *after* being rendered but before the losing party could challenge its validity on appeal." 494 U.S. at 483 (emphasis supplied). The resolution of that question has no bearing here because, as in *Buckhannon*, the injunction order was mooted *prior* to the trial court's final judgment.

Both the general rule barring attorney's fees with respect to orders mooted prior to final judgment and its application to this case make sense. *First*, interim orders like a stay or a preliminary injunction are inherently indeterminative of the ultimate outcome of a case. As demonstrated above, see *supra* at 19-22, this is especially so with respect to preliminary injunctions. See *Camenisch*, 451 U.S. at 395. This Court has declined to confer prevailing-party status on the basis of interlocutory rulings precisely because preliminary success does not guarantee that a party will ultimately prevail. See *Hanrahan*, 446 U.S. at 758 (despite an interlocutory ruling in favor of plaintiffs, "[t]he jury may or may not decide some or all of the issues in favor of [the plaintiffs]. If the jury should not [ultimately] do so . . . , it could not seriously be contended that the [plaintiffs] had prevailed"); *Hewitt*, 482 U.S. at 760 (interlocutory rulings are "not the stuff of which legal victories are made"). Because a finding of mootness prior to a final ruling forecloses further consideration of the mooted issue, *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), a plaintiff cannot convert a preliminary merits assessment into a judgment on the merits sufficient to warrant prevailing-party status.

Second, the mootness of an interim order deprives defendants of the opportunity to convince the trial court or an appeals court to reverse its initial ruling. An order that is mooted should have no further legal effect because "the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the [petitioner], there is no power to review it upon the merits." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916); see also *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) ("[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment"). Hence, vacatur of a mooted order is "commonly utilized . . . to

prevent a judgment, unreviewable because of mootness, from spawning *any* legal consequences." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950) (emphasis supplied).[19] By virtue of its mootness, the specific application of state laws to the February 14, 2003 demonstration that formed the basis of the preliminary injunction could not be decided on its merits by the district court or the court of appeals. Accordingly, the state defendants should not have to bear any of its "legal consequences" – including attorney's fees based on an interim ruling related to that legal claim.[20]

III. NEITHER THE LEGISLATIVE HISTORY NOR THE PURPOSES OF § 1988 SUPPORT A FEE AWARD FOR A PLAINTIFF WHO OBTAINS ONLY A PRELIMINARY INJUNCTION.

This Court has considered the legislative history and the purposes of § 1988 in defining "prevailing party." See *Buckhannon*, 532 U.S. at 604. Neither supports an award of

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[19] The *Munsingwear* Court observed that

> [t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. [340 U.S. at 39.]

This rule is especially critical in the context of fees because a plaintiff who wins at the trial court, but loses on appeal, is not "prevailing." *See, e.g.*, *Clark*, 890 F.2d at 626-27.

[20] To be certain, vacatur may be inappropriate when it is sought by the party that caused the case to be mooted. *See U.S. Bancorp*, 513 U.S. at 24. But that is not what happened in this case. Here, the preliminary injunction was mooted by its own terms. *See* Pet. App. 5a n.1; *see also U.S. Bancorp*, 513 U.S. at 23 ("vacatur must be decreed for those judgments whose review is . . . prevented through happenstance – that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties") (internal citations and quotation marks omitted).

attorney's fees to plaintiffs who obtained only a preliminary injunction based on claims whose merits were ultimately decided against them or, at best, were never decided through no fault of the defendants.

A. The Legislative History Of § 1988 Does Not Support Fee Awards To Plaintiffs Who Obtain Preliminary Injunctions And No Relief On The Merits.

In enacting § 1988, Congress intended to encourage *meritorious* civil rights suits and to discourage frivolous or vexation litigation. The Senate Judiciary Committee stated that "if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, at 2 (1976). See also H.R. Rep. No. 94-1558, at 1 (1976); *City of Riverside* v. *Rivera*, 477 U.S. 561, 578 (1986). At the same time, Congress actively sought to discourage suits that were "frivolous, vexatious, or brought for harassment purposes" by allowing courts to award fees to the *defendant* in such cases. S. Rep. No. 94-1011, at 5; see also H.R. Rep. No. 94-1558, at 7 (same).

Between these two poles lie cases in which the plaintiff has not obtained judicial vindication in the form of a judgment on the merits of a claim or a judicially-enforceable consent decree, but also has not pursued a frivolous suit to vex and harass the defendant. In such cases, the plaintiff is not required to pay the defendant's attorney's fees, and is not entitled to reimbursement of his or her fees. See, *e.g.*, S. Rep. No. 94-1011, at 5 (fee award to a defendant is "unjustified where a claim of racial discrimination, though meritless, was made in good faith").

Granting attorney's fees to a plaintiff who obtains a preliminary injunction but who does not receive a favorable judgment on the merits or any other judicially-enforced relief

resolving a claim does not serve the purposes Congress sought to achieve in enacting § 1988. An award of preliminary relief does not give rise to any factual or legal conclusion that is binding, let alone establish that the plaintiff has a meritorious claim under the civil rights laws. It reflects only some level of *likelihood* of future success on the merits (weighed with the possibility of future irreparable harm and the public interest), and "preserve[s] the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 394-95. It is not, therefore, tantamount to a decision on the merits of a civil rights claim, as Congress required for a fee award. See *id.* at 394-95.

B. Declining To Award Attorney's Fees To Plaintiffs Who Obtain Only Preliminary Injunctions Does Not Undermine The Purposes Of § 1988.

The interpretation of attorney's fees statutes raises important policy considerations, as the three opinions in *Buckhannon* make clear. See 532 U.S. at 608-10; *id.* at 618-20 (Scalia, J., concurring); *id.* at 622-23, 638-40 (Ginsburg, J., dissenting). In particular, members of this Court have expressed concern that the term "prevailing party" not be interpreted in ways that "will deter plaintiffs with meritorious but expensive cases from bringing suit." *Id.* at 608. Denying prevailing-party status to plaintiffs here will not deter plaintiffs with meritorious claims from bringing suit.

A plaintiff with a meritorious claim generally does not bring a civil rights action to obtain only a preliminary injunction. Most plaintiffs (including those here) seek permanent prospective relief and damages. If they prevail on the merits of those claims, they are entitled to fees.

It does not discourage meritorious civil right suits to decline to award fees to a plaintiff who obtained a preliminary injunction but ultimately loses on the merits of his or her claims. And, it does not discourage meritorious civil rights suits to decline to award fees where the plaintiff received

some temporary respite from the defendant's enforcement of its laws, but does not receive a determination on the merits because the underlying claim was mooted by the passage of time or by the plaintiff's actions. Indeed, in *Buckhannon*, this Court held that a plaintiff was not a prevailing party even when the *defendant's voluntary conduct* mooted a plaintiff's claim before judgment.[21] See also *Select Milk*, 400 F.3d at 959 (Henderson, J., dissenting) (an "attempt to link the preliminary relief and the final relief [resulting from the defendant's voluntary change in conduct] sounds suspiciously

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[21] The only scenario in which declining to award fees for a preliminary injunction could conceivably discourage meritorious suits is where a plaintiff obtains an injunction and the defendant then voluntarily and permanently changes its conduct, terminating the litigation and mooting the plaintiffs' claim. The *Buckhannon* dissent feared that disallowing fees to such catalyst plaintiffs might "impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general," 532 U.S. at 623 (Ginsburg, J., dissenting). But here, the plaintiffs' injunction effected only a temporary restraint on the state defendants' ability to enforce their laws; in the end, defendants' right to enforce their laws was vindicated. Nor did defendants impose upon plaintiffs the cost of testing their claims only to voluntarily moot the case when the preliminary injunction issued. The state defendants litigated the constitutionality of their laws to judgment. There is no indication in the legislative history that Congress sought to encourage civil rights suits of undetermined merit and no permanent consequence by awarding fees.

In any event, concern about a defendant's voluntary mooting behavior is significantly mitigated by the defendant's inability to moot a claim for damages and by the longstanding rule that voluntary cessation of unlawful conduct will not moot a claim unless "there is no reasonable expectation that the wrong will be repeated," which is a "heavy" burden. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (internal quotation marks omitted). This ameliorated the Court's concern about the denial of recovery based on the catalyst theory in *Buckhannon*. *See* 532 U.S. at 609 (citing *Friends of Earth, Inc.* v. *Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000)).

like the 'catalyst theory' jettisoned by the *Buckhannon* Court").

Turning to Congress's other concern – that plaintiffs *not* receive fees for suits that ultimately lack merit – it is noteworthy that a rule that attorney's fees are not awarded for preliminary injunctions alone *does* discourage suits by plaintiffs with meritless claims and plaintiffs who do not intend to litigate their claims to judgment (but instead use the judicial system to harass the defendant or achieve short-term gains). As explained *supra*, often it is not difficult to obtain a preliminary injunction for claimed violations of civil rights, particularly where (as here) the claimed deprivation involves First Amendment freedoms. If a plaintiff could obtain attorney's fees for a preliminary injunction, plaintiffs with weak cases or vexatious purposes could put defendants to the expense and burden of a preliminary injunction and then attempt to moot or otherwise abandon the case, without ever having tested the actual merits of their claims. Congress did not intend to encourage such suits.

Moreover, allowing fees for preliminary injunctions that do not lead to judgments on the merits would create undesirable incentives for plaintiffs and defendants. A plaintiff may seek to file and obtain a preliminary injunction at the very last minute before a defendant can prepare its defense. A state or municipal defendant may be less likely to oppose a preliminary injunction, even if the defendant believes its position to be correct on the merits, for fear that it might have to pay a successful plaintiff's fees. The cost of this is not insignificant – in many cases, the defendant may agree not to enforce its valid laws pending litigation to avoid paying attorney's fees in its successful defense of those laws. Cf. *Buckhannon*, 532 U.S. at 608 ("the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct").

Finally, as noted *supra*, this Court has often stated that "'a request for attorney's fees should not result in a second major

litigation.'" *Buckhannon*, 532 U.S. at 609 (alteration omitted) (quoting *Hensley*, 461 U.S. at 437). The rules of law proposed by petitioners are bright line rules that do not require inquiry into whether a preliminary injunction is a "status quo" injunction or a "merits" injunction. See *supra* at 28.

At best, plaintiffs seek an award of attorney's fees "when the merits of [their] case remain unresolved." *Buckhannon*, 532 U.S. at 617 (Scalia, J., concurring). But "[o]ne does not prevail in a suit that is never determined." *Id.* at 620 (Scalia, J. concurring). "[O]rdinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus*, 463 U.S. at 685. There is no reason to shift fees in this case.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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MICHAEL W. SOLE,
SECRETARY, FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners

v.

T.A. WYNER AND GEORGE SIMON,

Respondents

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

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QUESTION PRESENTED

Whether respondents are entitled to reasonable attorneys' fees as prevailing parties under 42 U.S.C. § 1988 for the time expended to obtain a judicial order that enjoined state officials from interfering with or arresting them for an anti-war protest in a state park.

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INTRODUCTION

This case involves an award of attorneys' fees for time spent to obtain a preliminary injunction that barred state officials from interfering with or arresting participants in an anti-war nude peace sign protest. The protesters won that preliminary injunction that allowed their protest to go forward as planned. The state officials lost.

Efforts by petitioners and their *amici* to undermine that victory and claim that the protesters were something other than the prevailing parties rely on a mischaracterization of the record and of the nature of the judicial order that resulted.

Contrary to the suggestions by petitioners and the United States, it was delay by state officials that limited the time for addressing a preliminary injunction, not any delay by the protesters. Respondent Wyner notified state officials a month in advance of the planned protest that was to include a peace sign composed of nude individuals. That notification was consistent with the ongoing cooperation between respondent Wyner and the state officials that arose out of a relationship that dated back more than a decade. Early in the past decade, Wyner had been arrested and threatened with arrest by state officials on various occasions because of her nude events at the beach. More recently, however, her nude events had been met "with cooperation or at least tolerance" by the state officials following an earlier round of state court litigation. Pet. App. 10a. In settling the earlier litigation, state officials had explicitly recognized that "nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." J.A. 22. Accordingly, state officials had allowed Wyner to direct and perform a play at the beach that contained nudity without interference or arrest.

Consistent with that history and past practice, the park manager for this protest initially responded to Wyner's notification about the nude anti-war protest in this case by stating that he was "sure that everything would work out fine" and that he did "not anticipate any

problems." *Id.* at 26. State officials waited until one week before the scheduled protest date to send Wyner a letter with their change of position. In that letter, Wyner was informed for the first time that state officials now believed the planned nude anti-war protest was not expressive conduct protected by the First Amendment and, even if it were, a prohibition on nudity at the protest was a reasonable manner restriction despite the fact that state officials had not previously prohibited nudity on the beach when it was part of a play rather than a political protest. Wyner moved with dispatch to bring a suit to allow the nude anti-war protest to go forward as planned without interference or arrest by state officials. She won precisely the relief she sought.

The judicial order enjoining petitioners from interfering with respondents' protest was based on what the district court recognized to be candid testimony by a state official that the State was applying the regulations regarding nudity differently to the nude anti-war protest than to the prior nude plays, undermining the State's argument that it was an appropriate manner restriction. The judicial order created a material change in the relationship between the protesters and the state officials. As a result of the preliminary injunction, the protesters engaged in their February 14, 2003 anti-war protest at the time, location, and in the manner planned, and state officials are permanently barred from imposing criminal sanctions on the protesters for that protest. That material alteration of the legal relationship between the parties by court order authorized the district court to award respondents reasonable attorneys' fees under 42 U.S.C. § 1988, limited to the fees incurred to obtain the preliminary injunction.

STATEMENT

A. Factual Background

The impetus for this case was the decision by state officials to deny a request by respondent T.A. Wyner for permission to create a temporary art installation

composed of nude individuals in the form of a peace sign as part of an anti-war protest scheduled to take place in the MacArthur Beach State Park on February 14, 2003. Petitioners are the manager of the park, Terence Coulliette, and the Secretary of the Florida Department of Environmental Protection who is responsible for the park.[1]

State officials had prior experience with events by Wyner involving nudity at the beach dating back more than a decade to when the State adopted rules prohibiting nudity at this particular beach that had historically had a clothing-optional section. Pet. App. 11a; J.A. 120-121 (State acknowledging such historical use). Respondent Wyner as well as respondent George Simon had brought earlier litigation in connection with arrests and threats of arrest at those events. Pet. App. 11a-12a. Indeed, state officials had entered into a 1995 court-enforceable settlement of respondent Simon's earlier suit that provided, in part, that although the state officials "do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." Pet. App. 11a-12a; J.A. 22. Subsequent to that settlement, Wyner engaged in nude theatrical events on occasion at the beach without arrest. Pet. App. 12a.

In mid-January 2003, respondent Wyner notified petitioner Coulliette by telephone of her intent to engage in a peaceful anti-war protest involving nudity to occur at the state beach the following month, on February 14, 2003. J.A. 60a. Her notification was consistent with the spirit of the settlement agreement and pursuant to the park's rules that indicated that persons engaging in "[f]ree speech activities," such as performances, displays, and signs, could contact the park manager to "determine what restrictions as to time, place, and manner may apply." Pet.

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[1] David D. Struhs was sued in his official capacity as Secretary of the Department; he has been succeeded by Michael W. Sole.

App. 6a n.3 (reprinting Fla. Admin. Code Ann. r. 62D-2.014(18)).

Respondent Wyner received no response from the state official for approximately two weeks. J.A. 24. On January 28, 2003, Coulliette responded to ask that Wyner repeat her intentions in writing. Wyner did so the next morning, on January 29, 2003, via electronic mail. Respondent Wyner explained:

> In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request I repeat my plans in writing.

Id. at 24. Respondent Wyner explicitly stated that she planned "to create a temporary art installation, comprised of nude bodies * * * on the traditionally clothing optional section" of the beach. *Ibid.* Moreover, she reiterated her desire to cooperate with petitioners, even though she believed that the First Amendment protected her proposed event. *Id.* at 25.

Later in the day on January 29, petitioner Coulliette responded by electronic mail and stated that he was "sure that everything will work out fine, as we communicate effectively, and seek cooperation and understanding." *Id.* at 26. Coulliette stated that he was forwarding Wyner's letter to the Bureau Chief, Parks District Five, for "review, consideration and input," and he did "not anticipate any problems at this time." *Ibid.*

On February 6, 2003, more than a week later, and just a week before the planned protest, petitioner Coulliette, on behalf of the Department, wrote Wyner a letter taking a different position. Contrary to the longstanding court settlement, the state officials now took the position that the First Amendment did not apply. The letter declared

that, "[a]t this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment." *Id.* at 29. The letter further stated that, "even if this were not the case," the State believed that "the decision not to allow nudity as part of your demonstration is a reasonable manner restriction." *Ibid.* The letter further noted that clothing was required by Florida Administrative Code Ann. r. 62D-2.014(7)(b), *id.* at 29, *see* Pet. App. 6a n.2 (reprinting provision), which state officials earlier had informed Wyner was enforceable by arrest and punishment as a misdemeanor. J.A. 57.

B. Proceedings Below

1. Preliminary Injunction

After receiving the state officials' letter with their new position that the planned nude anti-war protest was not constitutionally protected and would be criminally prohibited, respondent Wyner filed the instant suit seeking a court order to allow the planned protest to go forward on February 14, 2003, without interference or arrest by state officials. The Valentine's Day date of the event was scheduled to coordinate with other anti-war protests that weekend. Pet. App. 20a-21a; J.A. 65. Respondent George Simon, now a resident of Hawaii, also joined as a plaintiff because he intended to travel back to Florida from Hawaii to videotape the February 14, 2003 anti-war protest. J.A. 12; Pet. App. 10a.

Respondents brought the action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida on February 12, 2003, claiming violations of the First and Fourteenth Amendments. J.A. 18-19. Respondent Wyner alleged that she planned to engage in expressive conduct on February 14, 2003, and feared arrest. *Id.* at 17. Respondent Simon alleged that he wanted to travel to Florida to observe the protest on February 14, 2003, in an uncensored form. *Ibid.* The first claim for relief specifically sought the court's entry of "injunctive relief prohibiting [the state officials]

from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." *Id.* at 18.

Respondent Wyner also separately alleged that she intended to conduct expressive conduct in the future in the park involving non-erotic displays of nude bodies. *Id.* at 17. Based on that allegation, she sought in a separate claim for relief the court's entry of "injunctive relief prohibiting defendants from interfering with future expressive activities that may include non-erotic displays of nude human bodies." *Id.* at 19. Both respondents further sought, *inter alia*, attorneys' fees under 42 U.S.C. § 1988. *Id.* at 19.

Simultaneous with the filing of the complaint, respondents filed a Motion for Temporary Restraining Order and/or Preliminary Injunction to enjoin petitioners from arresting Wyner or otherwise interfering with the planned protest. *Id.* at 32-34. Respondents requested that the district court waive the time requirements of Federal Rule of Civil Procedure 65 and hold an immediate hearing. *Id.* at 32. They explained that it was only late the week before that petitioners had notified Wyner that they "disavowed [the] agreement" from 1995 in which they theretofore had acknowledged that "nudity coupled with expressive activity is protected by the First Amendment." *Id.* at 33.

The state officials filed a memorandum of law opposing the motion. *See* Pet. Mem. of Law in Opp. to Resp. Emergency Mot. for Temporary Restraining Order and/or Preliminary Injunction. They did not claim that they had insufficient time to respond, nor did they claim that respondents were somehow dilatory in filing the complaint and motion. Indeed, state officials later acknowledged that they had anticipated Wyner's legal challenge "as of early 2003," when she first wrote to them. Pet. Mem. of Law in Opp. to Mot. to Compel, Dist. Ct. Dkt. 52, at 3. They did not oppose respondents' request

to waive the time requirements of Federal Rule of Civil Procedure 65.

The district court convened a hearing on February 13, 2003, to consider respondents' request for a preliminary injunction. The court noted at the hearing that there was "short notice," but it understood that "the plaintiff ha[d] only had since about the 6th since she apparently got word that she couldn't do what she wanted to do." J.A. 37. The court specifically noted that petitioners were able to respond to the motion with their own memorandum. *Ibid.*; *see also Id.* at 96. Contrary to the claim of the United States that the district court was denied "adequate time to read the relevant case law" (U.S. Br. 4), the district court made clear that it had "read [the] memorandum" filed by the state officials, "together with I believe all the cases both of you have cited." *Id.* at 37; *see also id.* at 81 (district court discussing case law during hearing), *id.* at 92 (district court stating "I have heard the arguments, read the cases").

Respondent Wyner testified at the hearing. *Id.* at 44-69. She described her prior expressive activities involving nudity at MacArthur Beach State Park as well as the court-enforceable stipulation in respondent Simon's prior lawsuit in which respondent Wyner's plays involving nudity are expressly mentioned and in which the state officials "recognize[d] that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *Id.* at 22, 47-52. Wyner testified that the February 14, 2003 event was "intended to be a protest against the potential war in Iraq," *id.* at 60, and, based on the settlement and her initial contact with petitioner Coulliette, there had appeared to be no legal impediment to her plan. *Id.* at 63. Petitioners did not challenge Wyner's credibility. Indeed, petitioners had noted at the outset that there were no disputed facts. *Id.* at 39; *see also id.* at 42.

Respondents also proffered an affidavit from respondent Simon, which explained that he was planning

to fly from Hawaii to Florida with the intent to witness and videotape the February 14, 2003 protest at MacArthur Beach State Park. *Id.* at 67-68.

The state officials introduced testimony by Peter Scalco, the chief of operations for the Florida Park Service. *Id.* at 70-77. Mr. Scalco testified that he had observed all of respondent Wyner's plays in the park since 1997 as the assistant bureau chief in the district in which MacArthur Beach State Park is located. *Id.* at 70, 73. On cross-examination, Mr. Scalco was asked why the Department allowed some performances in the nude but prohibited others. *Id.* at 71. Mr. Scalco testified that the Department sought the advice of legal counsel. *Id.* at 73-76. He testified that they looked at each event individually to see if the same rules applied. *Id.* at 71. If he thought "there may be some controversy," he would ask for an opinion. *Id.* at 73. He acknowledged that "in each of those instances where nudity occurred" in plays at the beach, the Department did not apply its regulations requiring bathing suits – not because the nudity did not violate the regulations, but because "the context of the play fell within the parameters of our understanding of the legality of the action." *Id.* at 74. On redirect examination, the state attorneys confirmed that in past years they had been dealing with a specific play by Ms. Wyner, and that "this year something other than the play [was] going to go on." *Id.* at 77.

In response to a question from the court as to what was the basis for the different treatment of respondent Wyner's plays where nudity had sometimes been allowed and the proposed February 14, 2003 protest at issue before the court, Mr. Scalco testified that "the previous plays * * * talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration." *Ibid.*

The court granted the motion for preliminary injunction at the close of the hearing. *Id.* at 93. The court ruled that "it is clear" that Wyner's "protest does involve expression, it's not nudity for nudity's sake, the nudity

seems to be a significant part of the kind of statement that she is attempting to make, and I think that, while at least to me it seems a bit strange to protest the war in that fashion, I credit her statements about the vulnerability that it shows with respect to the war and the fact that there are no weapons." *Id.* at 94. The court found that "to ban it with respect to an anti-war protest is not in keeping with the First Amendment." *Id.* at 95.

The court specifically found "that it is apparent that on previous occasions Ms. Wyner's nude expression has been permitted and tolerated." *Id.* at 93. The court concluded that, although the Department argued that the nudity ban was "across-the-board and relates to free speech activities in every instance and that may be the intention going forward," "that has not been the history." *Id.* at 94. The court emphasized that testimony that an anti-war demonstration is different from a play was worrisome. *Ibid.* The court concluded that there were alternatives to meet the government's interests that were less restrictive than a complete nudity ban, such as signs and a barrier to advise beachgoers of the nudity in that area of the beach, which the State could explore. *Ibid.*

Finally, the court noted that there were other issues on which he was not prepared to rule that day, but that he was "satisfied with respect to this issue." *Id.* at 95.

Later that day, the district court entered a written preliminary injunction ordering that petitioners, in their official capacities, "shall neither prevent nor interfere with Plaintiffs' planned event on February 14, 2003." Pet. App. 19a.[2] The court stated that the questions before it were, "judging on the standards applied to a preliminary injunction motion, whether the planned activity is indeed expressive conduct, and if so, whether the restrictions, as applied to this activity, are permissible, and thus whether [the state officials'] prevention of the event would be a

[2] A version of the order correcting some typographical errors was filed on February 27, 2003, and is the version reprinted in the Petition Appendix.

First Amendment violation." Pet. App. 13a. Consistent with Eleventh Circuit precedent, the court held that respondents had "clearly established": (1) a substantial likelihood of success on the merits; (2) irreparable harm to respondents; (3) that the threatened injury outweighed any potential damage to the Department; and (4) that the injunction would not be adverse to the public interest. Pet. App. 14a. The court reasoned that the last three factors, *i.e.*, harm, comparative injury, and the public interest in this case, all depended on the first factor – the merits of whether the State's suppression of the activity would violate the First Amendment. *Id.* at 14a.

The court ruled in respondents' favor on the threshold claim, that "[n]ude overtly political speech in the form of a 'living nude peace symbol' is expressive conduct well within the ambit of the First Amendment," *id.* at 15a, and it recognized circuit precedent holding that the particular beach is a public forum. *Id.* at 16a. The court emphasized its concern that the rules had not been applied in a content neutral fashion and that "[t]he Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or antiwar protest." *Id.* at 16a-17a. The district court found it unnecessary to rely on the apparent lack of content neutrality of the Department's actions because respondents prevailed even under the *O'Brien* test. *Id.* at 17a, 22a n.5. As the court explained, "[t]here have already been instances of nude expression allowed in the Park" and the earlier settlement laid out less restrictive alternatives to a total ban on nudity. *Id.* at 18a. The court further noted that "the result in this case would be essentially the same regardless of which test were applied." *Id.* at 21a n.2. Thus, the court concluded, that "it is impossible to maintain the total ban on nudity as a reasonable restriction on the manner in which the 'living nude peace symbol' may be presented." *Id.* at 19a. In a final observation, the court noted that "[p]rotesting a potential war through naked protest seems a bit quixotic, but it is also part of the freedom that both those

supporting the war and those who oppose it seek to protect." *Ibid.*

The state officials did not seek a stay of the injunction from the district court. They did not exercise their statutory right to an immediate appeal of the preliminary injunction, *see* 28 U.S.C. § 1292(a)(1), and they did not seek a stay from a panel of the court of appeals, *see* Fed. R. App. P. 8(a)(2), or one of its judges, *see* Fed. R. App. P. 8(a)(2)(D).

The injunction therefore went into effect and respondents' anti-war protest involving a nude peace sign took place as scheduled on February 14, 2003, at the state park. As ordered by the court, the state officials did not and could not interfere or arrest respondent Wyner and the other participants for their peaceful protest.[3]

2. Summary Judgment And Attorneys' Fees Award

a. After the February 14, 2003 anti-war protest, the litigation continued on respondent Wyner's request for permanent injunctive relief to allow for future expressive activities by her that involved nudity to take place at the beach.

At a hearing on cross-motions for summary judgment, the district court made clear that the as-applied challenge to the State's application of the nudity ban to the February 14, 2003 protest on which the preliminary injunction had been granted was significantly different from the

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[3] The court had made clear that its "injunction does not preclude the posting of notices or signs advising Park visitors of the occurrence of th[e] event nor the use of other measures used in the past with respect to [respondent Wyner's] play [containing nudity]." Pet. App. 19a-20a. The court's injunction did not, however, require respondents to post notices or use a screen to hide the protest from the public. Nor did petitioners inform respondent Wyner on the day of the protest that she and the other demonstrators were required to stay behind a screen while nude. *See* Pet. Mem. of Law in Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 69, at 6; Resp. Reply to Pet. Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 77, at 8 n.12.

challenge that remained before the court to the constitutionality of the nudity ban regulation on its face. J.A. 102. The court emphasized that it had "granted the injunction basically based on the as applied arguments," focusing on the testimony that the reason the state officials did not let respondent engage in nudity this time was because "this was an anti-war protest" and not a play. *Id.* at 102; *id.* at 141.[4] By contrast, the court stated that all that was left was the facial challenge to the rule that one has to wear a bathing suit and that was "not a very strong case." *Id.* at 102. Whereas the court saw the merit in the case "we had before" where the State allowed some nude expression but then drew "the line at the anti-war protests," it did not find merit to the remaining facial challenge. *Id.* at 103. The court explained that "the danger at least that we saw" at the time of the preliminary injunction "was a decision being made based on content," and that was "no longer present" because prospectively the nudity ban, on its face, applied regardless of the event. *Id.* at 129; *id.* at. 129-130 ("the opinion could be read different ways, but really the reason for the opinion was [that state official's] testimony that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction.").

On January 28, 2004, the district court entered an order granting summary judgment to the state officials in relevant part. Pet. App. 23a-48a. The district court held that the preliminary injunction had "expired on its own terms" because it had applied only to the February 14, 2003 event. *Id.* at 34a. The court again noted that the preliminary injunction was based on the evidence that the nudity ban had been applied in a content-based fashion. *Id.* at 47a n.2. The court expressly held that respondents

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[4] Petitioners' attempt to undermine the credibility of the testimony on this straightforward question by claiming that it was "preliminary and rushed," Pet. Br. 7, ignores the district court's contrary assessment of the candor of the testimony. J.A. 114, 141.

were "successful at the preliminary injunction stage." *Id.* at 45a.

The statement by the district court elsewhere in the opinion that is highlighted by petitioners (Pet. Br. 10, quoting Pet. App. 35a) to the effect that respondents failed to show "actual success on the merits," plainly referred to the court's subsequent ruling in the opinion on the facial challenge. On that facial challenge that supported the request for a permanent injunction, the court ruled that respondents had not established that the State's across-the-board ban on nudity was unconstitutional on its face and it declined to permanently enjoin the state officials from enforcing the anti-nudity regulation as a reasonable manner restriction on free speech activities on the beach. Pet. App. 35a-42a.

b. The district court retained jurisdiction "for the purpose of awarding costs and fees, including those expended on the Motion for Preliminary Injunction upon which [respondents] prevailed." J.A. 145.

Respondents subsequently filed a motion to recover attorneys' fees under 42 U.S.C. § 1988 for the work expended to obtain the preliminary injunction that allowed the February 14, 2003 anti-war protest to proceed without interference or arrest by the State, which was "the primary purpose for filing this litigation." Resp. Mem. of Law in Supp. of Application for Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Dist. Ct. Dkt. 90, at 1. Respondents did not seek to recover fees for the time expended pursuing any relief other than the preliminary injunction. *Id.* at 2.[5]

The district court awarded respondents $25,924.50 in attorneys' fees. The court explained that respondents

[5] Respondents also did not seek any attorneys' fees against petitioner Coulliette in his individual capacity because no injunctive relief was sought against him in his individual capacity, J.A. 12 ¶ 10, and because the district court held that petitioner Coulliette in his individual capacity was entitled to qualified immunity on the damages claim. Pet. App. 32a.

prevailed on their as-applied challenge, and that "the driving force behind" the court's decision was the testimony of the State's witness at the preliminary injunction hearing that indicated that anti-war protests were treated differently by the State than plays. Br. in Opp. App. 4a n.2. Accordingly, the court held that respondents "achieve[d] one of the primary purposes for filing this litigation, [the] prevention of the [petitioners] from interfering with the temporary art installation planned for February 14, 2003." *Id.* at 3a.

3. Eleventh Circuit Affirmance

The court of appeals affirmed. Pet. App. 1a-8a. The court held, as an initial matter, that petitioners' appeal from the preliminary injunction was moot because "the injunction was about a finite event that occurred and ended on a specific, past date." *Id.* at 5a-6a n.1.

On the validity of the limited award of attorneys' fees, the court applied that circuit's test for determining whether a party obtaining a preliminary injunction was a prevailing party: whether the respondents obtained relief "on the merits" as opposed to an order that decided "no substantive issues." *Id.* at 2a (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)). The court concluded that the "preliminary injunction in this case decided a substantive issue – whether or not the state officials could arrest the nude peace symbol participants – and thus was on the merits." *Id.* at 3a.

The court rejected the argument that the attorneys' fees award should be reversed because the preliminary injunction was "based on a mistake of law" that had been "corrected" by the district court at the permanent injunction stage. *Id.* at 3a. With regard to the facial challenge which was the basis for the request for *permanent* injunctive relief, the court of appeals noted that the district court had held that "new developments" indicated that "a total ban on nudity was no greater than was essential to further the government's interest in protecting the public from offense of nudity." *Id.* at 4a. The

Eleventh Circuit thus concluded that the preliminary injunction was not based upon a mistake of law, but was based upon the different facts and circumstances of the different requests for injunctive relief. *Id.* at 5a.[6] Recognizing that the preliminary injunction embodied an as-applied challenge that was separate and distinct from the facial challenge adjudicated at the summary judgment stage, the court of appeals ruled that respondents "are entitled to prevailing party status and attorney's fees because the [district] court granted the preliminary injunction on the merits and [respondents] obtained the primary relief they sought." *Ibid.*

SUMMARY OF ARGUMENT

Respondents won a preliminary injunction on their as-applied challenge. They obtained a judicially enforceable order that provided them the relief they sought to allow their anti-war protest involving a nude peace sign to take place as scheduled. The preliminary injunction materially altered the legal relationship between them and the state officials who were prohibited from enforcing the nudity ban against them with respect to that protest. Nothing that happened in this case after the issuance of that preliminary injunction affected that victory. The injunction was not reversed. Respondents thus are prevailing parties under 42 U.S.C. § 1988, entitled to attorneys' fees for the time spent to obtain the preliminary injunction.

I.

A plaintiff who obtains a preliminary injunction can meet the definition of "prevailing party" distilled by this Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), if the injunction provides "some relief by

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[6] The court of appeals suggested that the district court was incorrect to conclude that its own earlier preliminary injunction had been based on petitioners' content-based application of its rule to the anti-war protest as opposed to plays. Pet. App. 6a n.4. *But see* pages 42-43, *infra*.

the court" to the plaintiff and creates a "material alteration of the legal relationship of the parties."

A. Preliminary injunctions can, and in this case did, materially alter the legal relationship between the parties. Respondents obtained an injunction that allowed their February 14, 2003 anti-war nude peace sign protest to go forward in the manner planned and it prohibited state officials from arresting or otherwise interfering with them for that protest. Respondents engaged in the February 14, 2003 protest under protection of that court order and are still protected by that order from arrest for their conduct on that day.

The state officials did not exercise their express statutory right of immediate appeal under 28 U.S.C. § 1292(a)(1). Congress enacted that immediate appeal in recognition of the fact that preliminary injunctions have permanent consequences that cannot be undone unless immediately appealed, which distinguishes injunctions from procedural orders. Petitioners' claim that they lacked the time to seek immediate appeal because of delay on the part of respondents is frivolous. Petitioners' attempt to claim that the nature of a preliminary injunction proceeding is somehow too "truncated" to support a fee award is similarly without merit. The record here is clear that the timing of the preliminary hearing was due to the state officials' delay in responding to respondents' advance notice of the protest, a month beforehand. And the courts of appeals are ready and able to resolve expedited appeals.

The state officials' failure to appeal, or even to seek a stay, meant that the preliminary injunction bound them and was backed by the court's contempt authority. Petitioners' claim that a court order that could put them in jail for contempt of court is *not* a sufficient alteration of the parties' legal relationship to satisfy the prevailing party standard therefore must be rejected.

B. Issuance of an injunction, whether preliminary or permanent, requires a court to consider the strength of the merits of the plaintiff's legal claim, in addition to

balancing other relevant factors. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1219 (2006). Petitioners' assertion that lower courts disregard this requirement is unsupported by any evidence of a pattern in the lower courts to that effect. There certainly is no evidence of such error in this case. Indeed, the district court here made clear that its consideration of the merits of respondents' First Amendment challenge to the state officials' application of the nudity ban against their anti-war protest was the "primary consideration" for its entry of the injunction. Pet. App. 14a.

This Court already has rejected petitioners' argument that Section 1988 requires a full adjudication of the merits to support an attorneys' fees award. More than 25 years ago, the Court held that prevailing party status under Section 1988 can rest upon the entry of a consent decree, *i.e.*, a settlement agreement reached by the parties that is entered as an order of the court, even though a consent decree is entered by a court without any adjudication of the merits of the claims. *See Maher v. Gagne*, 448 U.S. 122 (1980). Each reason given by the Court for that result is equally applicable to preliminary injunctions. This Court's more recent decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993), that a plaintiff was a prevailing party even though his eligibility for benefits remained uncertain at the end of the lawsuit, confirms that a plaintiff need not obtain final adjudication of the merits of a claim in order to be entitled to attorneys' fees. No decision of this Court supports petitioners' contrary position.

C. The language Congress used in Section 1988 demonstrates that it did not intend to limit a prevailing party only to those parties who prevailed in a final order. If Congress had intended to impose such a limit on the award of attorneys' fees under Section 1988, Congress could have mandated that fees be recoverable only where a plaintiff prevailed in a "final order" as Congress has done in other statutes both before and after it enacted Section 1988.

There were good policy reasons for Congress not to impose a final order requirement under Section 1988.

Congress intended through the remedies of Section 1988 to encourage litigation under Section 1983 to prevent and deter not just long-term violations of the Constitution, but also temporary or sporadic violations which often undermine the exercise of some of the most fundamental constitutional rights, including under the First Amendment.

II.

A. Petitioners err when they argue that respondents' preliminary injunction was somehow undermined by the district court's subsequent denial of a permanent injunction on a challenge to the nudity ban on its face. Petitioners reach this erroneous conclusion because they conflate respondents' as-applied challenge to the application of petitioners' regulation to the February 14, 2003 anti-war protest and respondent Wyner's facial challenge to the constitutionality of the regulation across the board.

Petitioners' claim that a plaintiff who obtains a preliminary injunction is never entitled to attorneys' fees when the merits underlying that injunction are subsequently rejected plainly does not apply to the instant case. The district court made clear in oral findings at the preliminary injunction hearing and in its subsequent written orders that the court granted the preliminary injunction because of the content-based nature of the state officials' application of the rule regarding nudity to the anti-war protest planned for February 14, 2003. That respondent Wyner did not succeed on her later facial challenge to the nudity ban has no bearing on the preliminary injunction entered to protect respondents from application of the state law to the February 14 protest. Further, the district court and court of appeals both correctly noted that nothing in the later order demonstrated that the earlier order was issued in error. In any event, such an argument would not bar recovery of attorneys' fees for respondent Simon, who had standing to pursue an injunction only for the February 14, 2003 protest.

B. The court of appeals' conclusion that the appeal of the preliminary injunction became moot after the anti-war protest occurred does not alter the prevailing party analysis. Every court of appeals to reach the issue has concluded that the fact that injunctive relief becomes moot before it is reviewed on appeal does not itself defeat prevailing party status. The two cases cited by petitioners in an attempt to draw this consensus into doubt are inapposite. They each involve a situation in which the relevant judgment was entered after the dispute already was moot. There is no disagreement here that there was an actual and on-going controversy between the parties at the time the preliminary injunction was issued, and that the district court's preliminary injunction benefited respondents personally by authorizing them to engage in the protest at the time and in the manner they desired without fear of arrest. An immediate appeal would not have been moot, but petitioners chose not to take that appeal.

ARGUMENT

RESPONDENTS WERE PREVAILING PARTIES ENTITLED TO REASONABLE ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 FOR THE INJUNCTION THEY OBTAINED TO ALLOW THEIR ANTI-WAR PROTEST TO GO FORWARD WITHOUT INTERFERENCE OR ARREST BY THE STATE

I. THE PRELIMINARY INJUNCTION HERE PROTECTED THE FEBRUARY 14, 2003 ANTI-WAR PROTESTERS FROM APPLICATION OF STATE LAW SUCH THAT RESPONDENTS WERE PREVAILING PARTIES UNDER SECTION 1988

A plaintiff who obtains a preliminary injunction is a "prevailing party" under 42 U.S.C. § 1988, if the plaintiff is "one who has been awarded some relief by the court" and the court order creates a "material alteration of the legal relationship of the parties." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and*

Human Resources, 532 U.S. 598, 603 (2001). Respondents are prevailing parties here where the injunction allowed them to exercise their constitutional rights with a court order against interference or arrest by state officials.

A. Preliminary Injunctions Can Provide Relief That Materially Changes The Legal Relationship Between The Parties And The Failure Of The State Officials To Exercise Their Right To An Immediate Appeal Ensured That The Injunction Did So In This Case

1. Preliminary injunctions can award relief and materially alter the legal relationship between parties

Respondent Wyner engaged in her February 14, 2003, anti-war nude peace-sign protest at the time, location, and in the manner planned despite the state officials' notification to her that the protest was not protected by the First Amendment and was subject to a state park nudity ban that was criminally enforceable. The preliminary injunction thus certainly conferred "some relief" upon her, as *Buckhannon* requires.

Respondent was able to engage in that protest without threat of interference or arrest by the State only because of the district court order enjoining petitioners. She could not have obtained, and indeed did not seek, any more judicial relief with regard to that protest. As the Tenth Circuit has explained in a similar circumstance, "[b]ecause of the district court's preliminary injunction, he did so participate [in an athletic competition]. No subsequent judicial proceedings could have given him any more relief on his claim." *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1513 (10th Cir. 1990).

Further, that preliminary injunction has an enduring material effect on the relationship between the respondent protesters and the petitioner state officials because

petitioners continue to be prevented from prosecuting respondents for engaging in the protest on February 14, 2003. *See Ashcroft v. ACLU*, 542 U.S. 656, 670-672 (2004) (upholding preliminary injunction that prohibited enforcement of a criminal law in part because preliminary injunction protected against threat of prosecution and thus against risk of self-censorship).[7] In this sense, the preliminary injunction "functions much like the grant of an irreversible partial summary judgment on the merits." *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006).

Petitioners attempt to blur this fact by arguing (Pet. Br. 16, 18, 24; U.S. Br. 24 n.14) that preliminary injunctions are short-term injunctions. But that depends entirely on the circumstances of a particular case. There is no correlation between the type of injunction and the length of time that the injunction is in effect. This Court often encounters preliminary injunctions that have been in effect for years. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1219 (2006) (affirming preliminary injunction issued four years earlier); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction issued five years earlier). By

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[7] *See Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920) (a district court's authority to enter a preliminary injunction includes the authority to permanently "restrain enforcement of penalties" for actions protected by that perliminary injunction, even if no constitutional violation is ultimately found); *see also, e.g.*, *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 578-581 (6th Cir. 2001) (preliminary injunction, reversed on appeal, that enjoined state courts from implementing state law prohibited imposition of liability on individuals who acted contrary to state law under protection of injunction while it was in effect), *cert. denied*, 535 U.S. 1053 (2002); *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) ("a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect"); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) ("If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties" even if the court order is erroneous and subject to reversal).

contrast, a permanent injunction may address a single, discrete event (such as a city obtaining a court order to raze a building) that occurs shortly after it is issued and then expires.

The amount of time that an injunction is in effect, whether preliminary or permanent, is not the talisman for whether a party prevails for purposes of attorneys' fees under Section 1988. The relevant issue is whether the injunction materially alters the legal relationship between the parties. A preliminary injunction can do that to the same extent as a permanent injunction. *See Coalition for Basic Human Needs v. King*, 691 F.2d 597, 601 (1st Cir. 1982) (Breyer, J.) (rejecting argument that "obtaining relief that is called 'preliminary' never warrants the award of attorney's fees").

In this case, for example, respondents went into court because the state officials had informed them that they believed the nude, expressive anti-war protest scheduled for February 14, 2003, was not protected by the First Amendment and that it was subject to the ban on nudity, which was criminally enforceable. The court entered an order enjoining the state officials from interfering or arresting respondents based on those grounds. That court order constitutes the type of "enforceable judgment" that "permits an award of attorneys' fees." *Buckhannon*, 532 U.S. at 607 n.9.

If an injunction is reversed on appeal, however, plaintiffs have not "prevailed" in the ordinary sense of that word, and thus attorneys' fees would ordinarily not be available. That is not the case here, however. The preliminary injunction in this case was not reversed.

2. Petitioners' failure to exercise their right to an immediate appeal of the preliminary injunction ensured the alteration in the legal relationship between the parties in this case

a. Congress made the grant of a preliminary injunction immediately appealable. *See* 28 U.S.C. § 1292(a)(1). The express statutory right to an immediate appeal demonstrates Congress's recognition that the grant of a preliminary injunction can have enduring and material consequences that cannot be undone unless subject to immediate review. "The manifest intent of this provision" was "to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests." *Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25 (1897); *see Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180-81 (1955) ("No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.").

The right to an immediate appeal distinguishes a preliminary injunction as an enforceable judgment, *see* Fed. R. Civ. P. 54(a), and not a mere procedural order regarding the conduct of the litigation, such as an order compelling discovery. The courts have consistently avoided any such slippery slope by distinguishing the type of order that falls within the scope of immediate appeal under Section 1292(a)(1) from one that does not, by a determination of whether the order: is directed to a party; has serious consequences; is enforceable by contempt, and is designed to accord or protect some or all of the substantive relief sought by a complaint. *See Bogosian v. Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991) (Breyer, J.); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3922 (3d ed. 1998); 19 James W. Moore, *Moore's Federal Practice*

§ 203.10[2] (3d ed. 2006).[8] Temporary restraining orders are generally not considered appealable injunctions under Section 1292(a)(1) because they are, by rule, supposed to be effective only for a very short duration, they are typically issued without notice to the adverse party, and they are issued before the trial court has had a full presentation of the underlying law. *See* 16 Wright & Miller, *supra*, § 3922.1; 19 Moore, *supra*, § 203.10[4].

b. Petitioners chose not to pursue their right of immediate appeal of the preliminary injunction in this case and, thus, allowed the preliminary injunction to go into effect so that it eliminated petitioners' authority to criminally sanction the protesters for the February 14, 2003 protest. That choice by the state officials is not an appropriate basis on which to deprive respondents of their status as prevailing parties entitled to a reasonable attorneys' fees for the preliminary injunction they obtained. That is particularly so because it is extraordinarily likely that the preliminary injunction would have been upheld on such an appeal against the state officials' declared view that the First Amendment did not apply and their failure to apply the nudity ban to other expressive conduct by respondent Wyner, which undermined a finding that application of the total ban to the anti-war protest was no greater than necessary.

Petitioners and their *amici* attempt to claim that petitioners lacked the time to seek appellate review of the court's injunction because respondents waited until the last minute to file their lawsuit. They similarly attempt to claim that the nature of the preliminary injunction proceeding was last minute and therefore somehow too

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[8] These appeals under Section 1292(a)(1) are distinct from the sovereign immunity or qualified immunity appeals relied upon by the United States. U.S. Br. 27. Those appeals are permitted under the collateral order doctrine of 28 U.S.C. § 1291 because, in part, the immunity orders "resolve an important issue completely separate from the merits of the action." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

"truncated" to support a fee award. Those arguments are completely devoid of merit. The record here is clear that the timing of the preliminary hearing was due to the state officials' delay in responding to respondents' advance notice of the protest, a month beforehand.

Respondent Wyner notified the petitioner park manager in mid-January of her planned February 14, 2003 protest. Petitioners did not respond for two weeks and then only to request a written submission. Respondent Wyner immediately provided a written submission and was led to believe that there would be no cause for litigation because the petitioner park manager did "not anticipate any problems." J.A. 29. It was not until a week before the scheduled protest that the state officials informed respondents of their new view that the nude protest was not protected by the First Amendment and that it would violate park rules that are criminally enforceable, contrary to their longstanding settlement with respondent Simon. In response to that notice, respondents moved promptly to bring suit for a preliminary injunction to allow the scheduled protest to go forward without the State's intervention or arrest.

Petitioners did not object to the timing of the hearing, did not claim that they had had inadequate time to prepare, and did not seek leave to develop more evidence. Indeed, their suggestion now of any claim of prejudice from the timing is frivolous. In the course of later litigation of certain discovery issues in this case, petitioners unequivocally conceded that, "as of early 2003" they expected litigation "as a result of communications with Plaintiff [Wyner] regarding her First Amendment rights." Pet. Mem. of Law in Opp. to Mot. to Compel, Dist. Ct. Dkt. 52, at 3. That expectation was, of course, the only reasonable expectation once the state officials decided to notify respondent Wyner that they believed the First Amendment did not apply, in light of the more than

decade-long history of litigation between the parties over earlier restrictions by the State.[9]

c. If the state officials had chosen to immediately appeal the preliminary injunction, rather than to capitulate, they could have taken their First Amendment arguments directly to the Eleventh Circuit for *de novo* review of the legal rulings, *see O Centro*, 126 S. Ct. at 1219, before expiration of the preliminary injunction (but, of course, would have faced the significant hurdle of the clearly correct constitutional analysis of the district court). The courts of appeals have recognized that special procedures are necessary to ensure that appeals from preliminary injunctions under Section 1292(a)(1) are reviewed in extremely short time frames. They have established extensive procedures for such cases.

In the Eleventh Circuit, consistent with other federal circuits, emergency motions may be filed outside of normal business hours where the appeal must be resolved within a day or so. *See* 11th Cir. R. 27-1(b). Counsel is also authorized to telephone the clerk and describe the motion prior to filing it to expedite its processing. *Ibid.* The Eleventh Circuit maintains a separate routing log for emergency cases, *see* 11th Cir. R. 27, I.O.P. 2, and, in part because of the Eleventh Circuit's extensive experience with capital cases, it can expeditiously resolve emergency appeals and motions. *See e.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005) (reviewing district court's denial of temporary relief entered earlier that same day); *Touchston v. McDermott*, 234 F.3d 1130 (11th Cir. 2000) (en banc) (denying injunction pending appeal filed three days earlier), *cert. denied*, 531 U.S. 1061 (2001);

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[9] Petitioners' general implication that problems might arise in other cases ignores the substantive rules that are in place to prevent delay by plaintiffs in bringing suit. Under settled rules of equity, in an appropriate case a court may withhold equitable relief, even if otherwise warranted, if a plaintiff has engaged in undue delay or tactics that prejudice the defendants. *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275-276 (2d Cir. 1985); *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984).

Lops v. Lops, 140 F.3d 927 (11th Cir. 1998) (granting emergency stay on the day following district court order), *cert. denied*, 525 U.S. 1158 (1999); *FTC v. Hospital Bd. of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994) (granting emergency injunction on the day following district court order).

3. Preliminary injunctions are enforceable through contempt with continuing collateral effects

Petitioners and their *amici* do not dispute the basic nature of an injunction as an alteration of the legal relationship between the parties. Indeed, they appear to concede that if the exact same order at issue here had been issued as a permanent injunction, that order would have met the test for a prevailing party, even if petitioners' broader facial challenge had failed at the same time. Pet. Br. 16, 30. Petitioners erroneously suggest, however, that there are distinctions between a preliminary injunction and a permanent injunction that make the former always insufficient to render the plaintiff "prevailing" for purposes of Section 1988. The courts of appeals have, with virtual unanimity, disagreed with this argument.[10] This Court should abide by that settled view.

The United States recognizes that, absent a stay or reversal on appeal before the protest, petitioners would have been in contempt of court if they failed to comply

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[10] *See, e.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005); *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982); *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Dubuc v. Green Oak Twp.*, 312 F.3d 736 (6th Cir. 2002); *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006); *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003); *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508 (10th Cir. 1990); *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987). *But see Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002).

with the preliminary injunction. U.S. Br. 27 n.18. It is well established that in such circumstances, stay or immediate appeal is the necessary avenue to attempt to undo the victory obtained by the opposing party: "If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *see also Walker v. City of Birmingham*, 388 U.S. 307 (1967). Thus, any efforts at a prosecution of the protesters for the February 14, 2003 anti-war nude peace sign protest would open petitioners up to contempt sanctions. Petitioners' claim that this court order that could put them in jail for contempt of court is *not* a sufficient material alteration of the parties' legal relationship to satisfy the prevailing party standard therefore must be rejected.

Moreover, protection from criminal prosecution is not the only enduring effect of such a preliminary injunction. Contrary to petitioners' assertion (Pet. Br. 21), preliminary injunctions sometimes can have *res judicata* effect on the parties on an issue if the issue was fully and fairly litigated. *See* 18A Wright & Miller, *supra*, § 4445; 18 Moore, *supra,* § 132.03[5][b][ii]; *Restatement (Second) of Judgments* § 13 cmt. g (1982). Although *res judicata* effect is not always appropriate for injunctions, *see University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), that is no basis for categorically excluding all preliminary injunctions from making a plaintiff a prevailing party, as petitioners argue.[11] Likewise, a decision on appeal from the

[11] The fact that some, but not all, preliminary injunctions do not have *res judicata* effects explains the "usual practice" of this Court and the courts of appeals to "dismiss the appeal as moot and not vacate the order appealed from" when a preliminary injunction expires prior to or during the pendency of the appeal. *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (Posner, J.); *see Nelson v. Quick Bear Quiver*, 126 S. Ct. 1026 (2006) (dismissing appeal from three-judge

(Continued on following page)

grant or denial of a preliminary injunction may become law of the case. *See* 18B Wright & Miller, *supra*, § 4478.5.

B. Preliminary Injunctions Are Based On The Merits Of A Claim As Well As Other Factors And Section 1988 Does Not Require A Full Adjudication Of The Merits To Support An Attorneys' Fees Award

1. Preliminary injunctions are based on the merits of a claim as well as a balance of other factors

The authority of a district court to issue an injunction is circumscribed by longstanding equitable rules. Those rules do not differ in any significant respect between preliminary and permanent injunctions. No injunction, whether preliminary or permanent, is issued without a court considering the strength of the merits of the plaintiff's legal claim, in addition to balancing relevant equitable factors.

A plaintiff seeking a preliminary injunction must demonstrate: (1) a likelihood of succeeding on the merits, *see O Centro*, 126 S. Ct. at 1219; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); and (2) that irreparable harm will result if a preliminary injunction is not entered. *O Centro*, 126 S. Ct. at 1219. A preliminary injunction will issue only on a showing of both these elements, balanced against consideration of (3) "the conveniences of the parties and possible injuries to them" that may "be affected by the granting or withholding of the

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court as moot, but not vacating preliminary injunction issued by that court); 13A Wright & Miller, *supra*, § 3533.10 ("if the case remains alive in the district court, it is sufficient to dismiss the appeal without directing" that an injunction that has expired or become moot "be vacated"). *Compare U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (describing the "equitable tradition of vacatur" reflected in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), that normally warrants the vacatur of a lower court's final judgment when the entire case becomes moot).

injunction" and (4) "the public interest." *Yakus v. United States*, 321 U.S. 414, 440 (1944).

Petitioners attempt to challenge preliminary injunctions generally as inappropriate for fee awards, asserting that they are not based on an assessment of the merits of the claim by lower courts, but only on the equities of the case. Pet. Br. 19-21. Petitioners' assertion is unsupported by any evidence of such a pattern of error on the part of the lower courts in violation of this Court's contrary instructions.

There certainly is no evidence of such error in this case. Indeed, the district court here made clear that its consideration of the merits of respondents' First Amendment challenge to the state officials' application of the nudity ban against their anti-war protest was the central basis for its entry of the injunction. After identifying the four-factor analysis, the court concluded that the public interest, the irreparable harm, and the relative injuries all rested on whether respondents had a meritorious claim. Pet. App. 14a-15a. To that end, the district court read all the cases cited by the parties, J.A. 37, 92, heard evidence from both sides, allowed oral argument, and then issued a detailed order describing his reasoning for issuance of the preliminary injunction explaining that its "primary consideration" in determining whether to grant the injunction was whether "a violation of [respondents'] First Amendment rights *will* occur." Pet. App. 14a (emphasis supplied).

The fundamental flaw in petitioners' assertion (Pet. Br. 19-21; U.S. Br. 12-13) that the balancing of other factors somehow eliminates the required determination by the court of the strength of the plaintiff's claim on the merits, is evident once one realizes that it would make every *permanent* injunction ineligible to convey prevailing party status, regardless of the strength of the merits. For the most part, the standard that governs a grant of a permanent injunction subsumes the standard that governs the grant of a preliminary injunction. *See eBay Inc. v.*

MercExchange, L.L.C., 126 S. Ct. 1837, 1839 (2006) (four-part analysis includes weighing of various equities).[12]

2. The same reasons that the Court held a consent decree can support prevailing party status, although it does not include a full adjudication of the merits, demonstrate that a preliminary injunction can as well

More than 25 years ago, this Court held that a plaintiff can be a "prevailing party" for purposes of Section 1988 without obtaining a judgment on the merits. The Court ruled that the entry of a consent decree, *i.e.*, a settlement agreement reached by the parties that is entered as an order of the court enforceable through the court's contempt authority, can render the plaintiff a prevailing party under Section 1988. *See Maher v. Gagne*, 448 U.S. 122 (1980); *see Buckhannon*, 532 U.S. at 604 (reiterating holding of *Maher*).

This is so even though a consent decree is entered by a court without an admission of liability by the defendants, *Buckhannon*, 532 U.S. at 604; *Maher*, 448 U.S. at 126 n.8, and often, in fact, contains an express *denial* of liability by the defendant. A court may enter a consent decree so long as it "spring[s] from" a complaint within the court's subject-matter jurisdiction; "come[s] within the general scope of the case" made by the complaint; and "further[s] the objectives of the law upon which the complaint was based." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citing *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)).

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[12] The United States contends that reliance on a preliminary injunction would impinge on the Seventh Amendment right to a jury trial. U.S. Br. 18. But suits against States (through their officials in their official capacities) under Section 1983 may seek only prospective injunctive relief, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and thus the Seventh Amendment, which governs only "suits at common law," has no applicability, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999).

The Court has identified three reasons for reading the term "prevailing party" to include a plaintiff who obtains a court entry of a settlement as a consent decree without an independent determination of the merits of the claims. Each reason given by the Court is equally applicable to preliminary injunctions. Indeed, as one court has noted, "there is even more reason to award attorneys' fees [for a preliminary injunction], where appellees did obtain a judicial determination that appellants had acted unconstitutionally" than "where a party prevails through a settlement." *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1012 (1981).

First, there is "nothing in the language" of Section 1988 that conditions a district court's power to award attorneys' fees "on a judicial determination that the plaintiff's rights have been violated." *Maher*, 448 U.S. at 129. The statutory text is satisfied if the plaintiff has succeeded in establishing a "court-ordered 'change in the legal relationship between the plaintiff and the defendant.'" *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (brackets omitted)). As demonstrated above, the preliminary injunction in this case did just that.

Second, Congress intended that a consent decree convey prevailing-party status on a plaintiff. The *Maher* Court noted that the Senate Judiciary Committee report on Section 1988 stated that plaintiffs are prevailing parties "when they vindicate their rights through a consent judgment." 448 U.S. at 129 (quoting S. Rep. No. 94-1011, at 5 (1976)). The House Judiciary Committee report reached the same conclusion: "If the litigation terminates by consent decree, for example, it would be proper to award counsel fees." H.R. Rep. No. 94-1558, at 7.

Similarly, Congress intended that a preliminary injunction like the one obtained by respondents convey prevailing party status. Both the Senate and House Reports indicated that Congress intended plaintiffs who obtained injunctive relief *pendente lite* to be prevailing

parties, even if the case was not concluded. *See* H.R. Rep. No. 94-1558, at 8; S. Rep. No. 94-1011, at 5.

Third, the Court recognized that an award of attorneys' fees to a party that prevails through a court-approved settlement promotes judicial economy because it eliminates any incentive to continue to litigate a case to a final ruling on the merits for the sole reason of ensuring fee recovery. The Court emphasized that "Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court." *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (quoting H.R. Rep. No. 94-1588, at 7). The settlement of Section 1983 litigation "provides benefits for civil rights plaintiffs as well as defendants and is consistent with the purposes of [Section 1988]." *Evans v. Jeff D.*, 475 U.S. 717, 732-733 (1986).

So too with regard to preliminary injunctions. An award of fees to plaintiffs who obtain a preliminary injunction that protects a planned protest or other time-sensitive exercise of constitutional rights, eliminates an incentive that otherwise arises to continue to litigate for additional remedies, such as damages, for the sole reason of recovering attorney's fees. That often is the situation in Section 1983 cases that are comparable to the instant case but do not have the same long history. A plaintiff challenging an application of law as unconstitutional against a particular protest or other event, such as an election or high school graduation, often has no interest in and does not pursue a broader facial challenge.

3. The Court also has held that a reversal of agency action without full adjudication of the merits can support prevailing party status

This Court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993), interpreting the term "prevailing party" in the Equal Access to Justice Act, 28 U.S.C. § 2412(d), confirms that a plaintiff need not obtain a full adjudication on the merits of a claim in order to be entitled to attorneys' fees.

That case involved a challenge to a decision by the Secretary of Health and Human Services to deny an individual Social Security benefits. At the end of the court litigation, the plaintiff had not obtained benefits but was nonetheless deemed a prevailing party for purposes of obtaining attorneys' fees. The district court had denied plaintiff's motion for summary judgment to be awarded benefits, but also had determined that the Secretary had made three errors in its determination of whether plaintiff was eligible for Social Security benefits that required the agency
to reconsider the case. The court thus reversed the Secretary's decision and remanded the issue to the Secretary for further consideration.

This Court explained that such a remand "confer[red] prevailing-party status" because "'the plaintiff ha[d] succeeded on [a] significant issue in litigation which achieved some of the benefit . . . sought in bringing suit.'" *Schaefer*, 509 U.S. at 302 (quoting *Texas State Teachers*, 489 U.S. at 791-792 (citation and other internal quotation marks omitted in original)). The plaintiff was thus entitled to attorneys' fees regardless of whether he was ultimately awarded benefits. *Ibid.*; *see Muhur v. Ashcroft*, 382 F.3d 653, 654 (7th Cir. 2004) (Posner, J.).

4. This Court's precedents do not require full adjudication of the merits as a necessary prerequisite for prevailing party status

Petitioners invoke several of this Court's attorneys' fees precedents to support their argument that a judgment on the merits is required for prevailing party status under Section 1988, but none of those decisions support their position.

As petitioners note (Pet. Br. 16-17, 32), the district court in *Buckhannon* had entered a stay in that case and they suggest that this Court's opinion can somehow be read to hold implicitly that a stay is insufficient to support prevailing party status because it is not an adjudication on the merits. But this Court did not give any legal

significance to the stay in its ruling in the case. In fact, the majority tersely described it merely as an agreement by the parties to stay enforcement of the orders. *See* 532 U.S. at 601; *see id.* at 623 (Ginsburg, J., dissenting) (also characterizing it as an agreement by parties). Rather, the Court ruled on whether the fact that the lawsuit allegedly caused the defendant to amend its laws, without more, *i.e.*, as a "catalyst," was sufficient to make plaintiff a prevailing party under Section 1988, and held that it was not.

Petitioners also rely (Pet. Br. 18-19) on *Hewitt v. Helms*, 482 U.S. 755 (1987), to suggest that this Court has held that rulings that address, but do not finally determine, the merits of a plaintiff's claim cannot confer prevailing party status. But in *Hewitt*, the problem was that plaintiff never received any injunction or judgment in his favor, even though he may have been eligible for such relief. "[T]he fact is that Helms' counsel never took the steps necessary to have a declaratory judgment or expungement order properly entered. Consequently, Helms received no judicial relief." *Id.* at 760. That was because, until the attorneys' fees proceeding, the primary goal in that lawsuit was to recover damages against officials in their individual capacities; "[i]n the District Court, Helms pursued only his claims for damages." *Id.* at 758. Having received no relief, he could hardly be described as a prevailing party.

Similarly, petitioners' reliance (Pet. Br. 19; U.S. Br. 9-10, 23) on this Court's statements that liability and attorneys' fees go hand in hand, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985), is error because those statements address a separate question of *who* is required to pay attorneys' fees. They do not address the standard for determining when a plaintiff is a prevailing party entitled to such fees. The district court in this case plainly abided by this requirement. The state officials in their official capacities who were enjoined are those against whom the attorneys' fees were imposed. The attorneys' fee award does not run against the state official Coulliette in his individual capacity because the preliminary injunction did not run against him in his individual capacity. *See* note 5, *supra*.

Finally, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), relied on by petitioners (Pet. Br. 15, 34; U.S. Br. 15-16), also is not on point. In that case, the court of appeals reversed a judgment in favor of the defendants and remanded a case for a new trial. The Court held that plaintiffs were not "prevailing parties" because the court of appeals' order simply gave plaintiffs the opportunity to prove their case to a jury, the very position that "they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court." *Hanrahan*, 446 U.S. at 759. Here, by contrast, the court's preliminary injunction gave respondents the right to engage in their anti-war protest at the time and location and on the date and in the manner they had planned, without interference or fear of arrest, a change from when they initiated the litigation. Although the opinion in *Hanrahan* states that plaintiffs must obtain "some relief on the merits" to be a prevailing party, *id.* at 757, the opinion was decided in summary fashion without full briefing before this Court issued its fully-briefed decision in *Maher*, which made clear that a consent decree conveyed prevailing party status regardless of any court consideration of the merits. In any event, as demonstrated above, the preliminary injunction in the instant case was rooted in the district court's assessment of the merits of respondents' First Amendment claim.[13]

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[13] The United States alone (U.S. Br. 14-15) argues that *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), also supports petitioners' argument. In *Stewart*, the only relief obtained was a declaratory judgment by the district court against the prison that was of no benefit to plaintiffs because they had already been released from prison. Here, by contrast, respondents obtained court-ordered relief that personally benefited them because the preliminary injunction removed the reasonable fear of prosecution for being arrested for being nude at the anti-war protest on February 14, 2003.

C. Congress Did Not Require In Section 1988, As It Did In Certain Other Statutes, That A Plaintiff Prevail In A "Final Order" To Be Eligible For Attorneys' Fees And That Omission Is Supported By Powerful Policy Considerations

The language Congress used in Section 1988 demonstrates that it did not intend to limit a prevailing party only to those parties who prevailed in a final order. If Congress had intended to impose such a limit on the award of attorneys' fees under Section 1988, it had several statutory models which it could have followed. *See* H.R. Rep. No. 94-1558, at 13-14 (listing 54 previously enacted attorneys' fees provisions). There were good policy reasons for Congress not doing so.

1. At the time that Section 1988 was under consideration, Congress had enacted a number of statutes, including the civil rights attorneys' fees statute at issue in *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), that authorized a court to "allow the prevailing party * * * a reasonable attorneys' fee as part of the costs" only "[u]pon entry of final order of a court." *Id.* at 709 n.12 (quoting Education Amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 235, 369). Congress understood the term "final order" to impose a requirement separate from the "prevailing party" language. *See* 117 Cong. Rec. 11,343 (1971) (Statement of Sen. Mondale) ("the requirement that payment of fees and costs be made only after a final order had been issued * * * makes sense, in order to discourage champertous lawsuits. * * * We do not want an attorney to be given fees unless the court and the parties have determined that the suit was well founded * * * ."); *id.* at 11,523 (Statement of Sen. Allen) (statute requires that suit must "be prosecuted to a successful conclusion").

The Court in *Bradley* held, relying on that "final order" language, that the Education Amendments "make[] the existence of a final order a prerequisite to the award." *Bradley*, 416 U.S. at 722. Thus, contrary to the argument of the United States (U.S. Br. 23), the requirement of a

final order in *Bradley* derived not from the term "prevailing party" in that statute, but rather from the express statutory language of "final order" not found in Section 1988.

Congress has continued to use that same "final order" language in other federal attorneys' fee statutes after it enacted Section 1988. *See, e.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 5, 108 Stat. 1545, 1549 (1994) (codified at 15 U.S.C. § 6104(d)); Water Resources Development Act of 1990, Pub. L. No. 101-640, § 402, 104 Stat. 4604, 4644 (1990) (codified at 16 U.S.C. § 460tt(c)(1)); *see also* U.S. Br. 18-19 n.10 (noting earlier costs statute that imposed a "final hearing" requirement).

Despite these clear examples limiting fees to those who prevailed only in a "final order," Congress did not incorporate that language into Section 1988. Rather, it enacted a statute that did not condition recovery of attorneys' fees on final orders, and did so intentionally. The House Judiciary Committee Report on Section 1988 specifically explained that "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered." H.R. Rep. No. 94-1558, at 8; *see also* S. Rep. No. 94-1011, at 5 (Senate Judiciary Committee report states that "counsel fees under [the reported bill] may be awarded pendente lite").[14]

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[14] Shortly before Congress enacted Section 1988, it also had enacted a statute that permitted an award of attorneys' fees only if a plaintiff "finally prevails" in an action. *See* Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 110, 88 Stat. 2183, 2189 (1975) (codified at 15 U.S.C. § 2310(d)(2)) ("If a consumer finally prevails in any action * * *, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) * * * ."); *see also* 7 U.S.C. § 18(d) ("If the petitioner finally prevails, he shall be allowed a reasonable attorneys' fee to be taxed and collected as a part of the costs of the suit."); 7 U.S.C. § 210(f) (same); 7 U.S.C. § 499g(b) (same); 45 U.S.C. § 153(p) (same); 47 U.S.C. § 407 (same). What showing is required to establish that a plaintiff "finally prevails" in an action

(Continued on following page)

2. The absence of a final order requirement in Section 1988 makes sense given the broad range of remedies that are appropriate under Section 1988. Congress rationally concluded that Section 1988 needed to be broader than its predecessors and to not incorporate a final order requirement.

Congress intended through the remedies of Section 1988 to encourage litigation under Section 1983 to prevent and deter not just long-term violations of the Constitution, but also temporary or sporadic violations which often undermine exercise of some of the most fundamental constitutional rights including under the First Amendment. *See* H.R. Rep. No. 94-1558, at 4-5.

The instant case exemplifies that fundamental role of Section 1983 in curbing government violation of constitutional rights. The February 6, 2003 notice from the state officials to respondent Wyner stated that they did not believe that "the nudity planned for [her] activities is expressive conduct protected by the First Amendment." Pet. App. 13a. That position was directly contrary to a pre-existing court-approved settlement in which state officials stated that they "recognize[d] that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *Id.* at 11a-12a. The State's February 6 notice further stated that, even if the First Amendment applied, the state officials believed that the nudity ban was a reasonable restriction and that Wyner could not engage in an anti-war protest using the expressive tool (*i.e.*, nudity) of her choice without running afoul of the rule, which is criminally enforceable. J.A. 29. That position was inconsistent with the state officials' prior

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under those statutes is not at issue in this case, although respondents can be said to have finally prevailed in this action because they finally prevailed on their claim for relief for the February 14, 2003 anti-war protest. What is notable is that Congress did not include such a requirement in Section 1988 despite the use of such language in other contemporaneous fees statutes.

application of the very same state rule to other expressive activity by Wyner, herself, that involved nudity which they had allowed without interference or arrest.

The February 6 notice is precisely the type of state action that Section 1988 was intended to address, as the notice sought to discourage the exercise of First Amendment rights through a discretionary content-based decision of a low level official. Most telling perhaps is that, after the preliminary injunction had been adjudicated, the petitioner state officials again admitted later in this litigation that "[i]nnocent, non-erotic nudity in expressive activities in MacArthur Beach State Park is protected under the First Amendment." Joint Pretrial Stipulation, Dist. Ct. Dkt. 76, at 16 ("Issues of Law in which the Parties Agree"). Yet, absent the ability to recover the attorneys' fees required to obtain a preliminary injunction, an individual normally would be unable to afford to challenge an action such as the State's February 6, 2003 notice, which the state officials themselves later recognized was based on an erroneous constitutional interpretation.

The *amicus* briefs filed in this case by organizations that represent individuals and entities from across the spectrum who are likely to be plaintiffs in cases covered by Section 1988 demonstrate that there are a host of situations in which plaintiffs need to bring constitutional challenges to government actions that, by their nature, must be resolved by a preliminary injunction to provide meaningful relief but which become moot before discovery and a full bench trial can be heard by a district court. These cases involve core constitutional rights such as voting, access to the ballot, the free exercise of religion, and free speech by public school students. *See* Brief of the Brennan Center, at 6-13; Brief of Americans United for Separation of Church and State *et al.*, at 9, 11, 12-13; Brief of the Center for Individual Rights, at 2-6.

Petitioners' proposal to disregard the plain text of Section 1988 and to import into that provision a limitation imposed by Congress in different statutes through

different language is unsupported by any indication on the part of Congress to shield such time-sensitive violations from litigation. Yet, absent the availability of court-awarded attorneys' fees, that would be the result because few potential plaintiffs will be able to afford to retain attorneys to challenge those violations. *See* S. Rep. No. 94-1011, at 5-6; H.R. Rep. No. 94-1558, at 2-3; Brief of the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity *et al.*, at 7-13 (predicting, based on empirical study, that a *per se* rule excluding preliminary injunctions would erode the ability of indigent civil right claimants to find legal representation).

3. Finally, an inherent flaw in petitioners' final order argument with regard to preliminary injunctions is that that argument would mean that almost no permanent injunctions would support prevailing party status for attorneys' fees under Section 1988 either. The notion of a final order is not as concrete with regard to injunctions generally as it is when dealing with monetary relief. A district court is vested with authority to alter, amend, or vacate both preliminary and permanent injunctions based on changes in statutes, case law, or factual circumstances. *See Agostini v. Felton*, 521 U.S. 203 (1997); *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384-385 (1992); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995) (Federal Rule of Civil Procedure 60, which "authorizes discretionary judicial revision of judgments, * * * merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity") (citation omitted).

II. Later Rulings On The Broader Facial Challenge To The State Rule And On Mootness Of The Preliminary Injunction Appeal Do Not Require Reversal

Petitioners contend that, even if some preliminary injunctions are sufficient to make a plaintiff a prevailing

party, the preliminary injunction in this case was not because it was undermined by the subsequent denial of a permanent injunction and was mooted prior to the final judgment. Neither of those claims is correct in this case.

A. The Later Denial Of A Permanent Injunction On The Broader Facial Challenge Does Not Deprive Respondents Of Their Prevailing-Party Status On The As-Applied Preliminary Injunction

Petitioners argue (Pet. Br. 28-31) that a plaintiff who obtains a preliminary injunction is never entitled to attorneys' fees when that injunction "rests on premises rejected in a subsequent decision on the merits of plaintiff's claims." That argument does not apply to this case for two reasons.

1. Petitioners are mistaken that the district court ultimately rejected on the merits the same claim that gave rise to the preliminary injunction. The preliminary injunction was granted based on an as-applied challenge and the permanent injunction was denied on a facial challenge. *See* Br. in Opp. 4 (quoting Pet. App. 3a-4a).

Respondents' successful claim at the preliminary injunction stage was a challenge to the state officials' application of the nudity ban to the anti-war nude peace sign protest on February 14, 2003, when state officials earlier had stipulated that the First Amendment applied to such activity and had not found it necessary to apply the nudity ban to other expressive activity involving nudity in which respondents had engaged.

The district court made clear in several instances that the preliminary injunction was granted because of the content-based nature of the state officials' application of the nudity ban to the anti-war protest planned for February 14, 2003, including in its oral findings at the conclusion of the preliminary injunction hearing, see Fed. R. Civ. P. 52(a), in the hearing on summary judgment on the permanent injunction, and in its subsequent orders. *See* Pet. App. 47a n.2 (explaining in summary

judgment order that "[f]rom Mr. Scalco's testimony, the Court perceived the [Department] to be applying the rules in a content-based and therefore unconstitutional manner."); Br. in Opp. App. 4a n.2 (same in order regarding attorneys' fees); Pet. App. 16a-17a (district court's opinion on grant of preliminary injunction stating concern that "[t]he Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or anti-war protest."); J.A. 94 (district court noting at preliminary injunction hearing that testimony was worrisome "that somehow an anti-war demonstration is different than a play."); J.A. 129-130 (district court stating during summary judgment hearing that, "really the reason for the opinion was [the] testimony that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction."). Although the court of appeals indicated its disagreement with the district court's explanation, Pet. App. 4a n.4, certainly, the district court judge, himself, was in the best position to identify the ground on which he had based his own order. *Cf. Fiore v. White*, 531 U.S. 225 (2001) (accepting Pennsylvania Supreme Court's explanation of what its earlier opinion meant).

The continuation of the lawsuit after the anti-war protest took place on February 14, 2003, was, by contrast, based on respondent Wyner's challenge to the constitutionality of the nudity ban regulation on its face. Although the district court rejected the latter challenge, nothing in its order reversed its preliminary injunction holding on the merits or precludes future as-applied challenges based on intervening factual circumstances, such as new evidence of content- or viewpoint-based enforcement by state officials. *Cf. Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 812-813 (1985) (reversing injunction against federal policy because government had "facially neutral" grounds for policy, but remanding for further evidence whether "the exclusion of *respondents* was impermissibly motivated by a desire to

suppress a particular point of view" (emphasis supplied)).[15] Indeed, the court of appeals also expressly concluded that the preliminary injunction was not based upon a "mistake of law," but was based upon the different facts and circumstances of the different requests for injunctive relief. Pet. App. 5a.

2. The distinct standing of the two respondents in this case further highlights the distinction between the two legal challenges.

Although respondent Wyner established standing to challenge both the application of the park regulation to the February 14, 2003 protest *and* the facial constitutionality of the regulation after that date, the evidence about respondent Simon involved *only* application of the park regulation to the February 14, 2003 protest. Thus, as the United States notes, Simon lacked standing to obtain any relief for any events subsequent to the February 14, 2003 protest. U.S. Br. 3 n.3; *see also* Pet. Mem. of Law in Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 69, at 3 (arguing that there was no admissible evidence regarding Simon's future plans to travel from Hawaii to Florida to engage in or observe nude expressive activity).

The United States' analysis stops short, however. Because respondent Simon lacked standing to seek any

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[15] One of petitioners' *amici* notes that petitioners were held to be the prevailing party for purposes of costs at the same time respondents were the prevailing party for purposes of costs and attorneys' fees. Br. of Nat'l League of Cities *et al.*, at 21. It is not uncommon that both sides in litigation will be denominated the prevailing party in a single action. *See* Thomas J. Goger, Annotation, *Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims*, 66 A.L.R.3d 1115, § 4 (1975); *see also Dobson v. Hartford Carpet Co.*, 114 U.S. 439, 447 (1885) ("The final decrees in all of the suits are reversed, and the cases are remanded to the circuit court, with directions to disallow the award of damages in each suit, and to award six cents damages in each, and to allow to the defendants a recovery in each case for their costs after interlocutory decree, and to the plaintiff in each case a recovery for its costs to and including interlocutory decree.").

relief other than the preliminary injunction that he obtained, the district court's ultimate denial of a permanent injunction on the merits could not and did not bind him. Thus, as to respondent Simon, this case is no different than if the district court had lost the authority to issue an ultimate conclusion on the merits because the case subsequently became moot, an issue we discuss in Part II.B, *infra*.

This Court already has made clear that "[t]he congressional intent to limit awards to prevailing parties" requires that "unrelated claims [in a single lawsuit] be treated as if they had been raised in separate lawsuits" to determine whether attorneys' fees are available for a claim. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Likewise, it is appropriate to treat the claims in this action as if they had been filed in separate lawsuits: respondent Simon filed a complaint for an injunction based on the February 14, 2003 protest and nothing else; respondent Wyner filed the same complaint for an injunction based on the February 14, 2003 protest but also filed a separate complaint for a broader injunction based on the alleged unconstitutionality of the nudity ban on its face. Respondents also could have structured their complaint to have two distinct counts, but either way, respondents would have plainly prevailed in the first action (or count) on a preliminary injunction, but not in the second, and thus would be entitled to reasonable attorneys' fees for the first but not the second.

The eligibility for an award of attorneys' fees cannot turn on whether plaintiffs bring all their challenges in separate actions challenging discrete events or policies, in separately denominated counts of a single complaint, or if they litigate the as-applied and facial components of a single count separately. The contrary rule would encourage claim splitting with no appreciable benefit to defendants, while imposing an additional strain on judicial resources.

B. The Court Of Appeals' Ruling That Petitioners' Later Appeal Of The Preliminary Injunction Was Moot Does Not Deprive Respondents Of Their Status As Prevailing Parties On The Preliminary Injunction

Petitioners claim that any injunction that becomes moot before the district court enters final judgment cannot be the basis for determining a party's status as a prevailing party. Petitioners' argument in this regard is not limited to preliminary injunctions, but even permanent injunctions that become moot before the final judgment is entered in the case by the district court.

There is no rationale for petitioners' reliance on the district court's final judgment as the point to measure whether a plaintiff prevailed by obtaining an injunction. Particularly when Congress provided each defendant subject to a preliminary injunction an opportunity to an immediate appeal, looking to the district court's final judgment makes no sense. The courts of appeals agree that "[t]he fact that the case was moot by the time of appeal does not alter the fact that the injunction altered the legal relationship between the parties when it was issued." *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528 (D.C. Cir. 1999). Indeed, one of petitioners' own *amicus* recognizes that "every circuit to reach the question has concluded that the fact that injunctive relief becomes moot before it can be reviewed on appeal does not itself defeat prevailing party status." Br. of Nat'l League of Cities *et al.*, at 23 n.17 (collecting cases from seven circuits).[16]

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[16] See, in addition to the D.C. Circuit cases cited in the text, *e.g.*, *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997); *Murphy v. Ft. Worth Indep. Sch. Dist.*, 334 F.3d 470 (5th Cir. 2003) (per curiam); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) (per curiam); *Bishop v. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n*, 686 F.2d 1278 (8th Cir. 1982); *Richard S. v. Dep't of Developmental Servs. of Cal.*, 317 F.3d 1080 (9th Cir. 2003); *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508 (10th Cir. 1990).

The two cases cited by petitioners in an attempt to draw this consensus into doubt are inapposite. They each involve a situation in which, at the time that the relevant judgment was entered, the underlying case or controversy already had become moot. Of course, when a court lacks the authority to issue a judgment because there is no existing case and controversy, it is appropriate to say that any judgment issued in that case did not make the plaintiffs prevailing parties. That is the holding of *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam).

In the instant case, however, there is no dispute that there was an actual and on-going controversy between the parties in this case at the time the preliminary injunction was entered. That validly entered court order benefited respondents personally by authorizing them to engage in the protest at the time and in the manner they desired without fear of arrest and was not reversed.

Lewis v. Continental Bank Corp., 494 U.S. 472 (1990), is likewise of no support to petitioners. In that case, the Court vacated the court of appeals' judgment in favor of the plaintiff because of an intervening change in law that had occurred while the case was pending in the court of appeals that mooted plaintiff's challenge. The Court thus concluded that plaintiff was no longer a prevailing party *in the court of appeals*. The Court expressly did not decide whether the plaintiff could recover attorneys' fees for prevailing in the district court in a case where the case became moot after the district court entered its final judgment "but before the losing party *could* challenge its validity on appeal." *Id.* at 483 (emphasis supplied). This case is at least one step removed from *Lewis*. An appeal of the preliminary injunction would not have been moot before the losing party could challenge its validity on appeal, because petitioners had an immediate right of appeal under 28 U.S.C. § 1292(a)(1). Petitioners chose not to take that appeal. They should not obtain a benefit for their inaction.

In this case, the district court's preliminary injunction provided certain relief to respondents by altering the legal

rights of the parties – protecting respondents from arrest for their conduct on February 14, 2003, while placing petitioners under threat of contempt unless they complied with the injunction. The preliminary injunction was not vacated or reversed by either the district court or court of appeals. It expired when the protest concluded. "The mootness of the subsequent appeal of that holding following the actual [anti-war protest] * * * emphasizes, rather than detracts from, the practical substance of their victory." *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C. Cir. 1986).

* * *

A ruling in this case that a preliminary injunction can make a plaintiff a prevailing party does not mean that the plaintiff is entitled to fees expended on any other aspect of the case, or even all the fees for the preliminary injunction portion of the case. As this Court noted in *Buckhannon*, a district court's determination of the distinct question of what are reasonable attorneys' fees is extremely fact-intensive and can be influenced by all the circumstances surrounding the case. *See* 532 U.S. at 604 & n.6; *see also Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) ("the *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all"). But petitioners' proposed categorical rule that excludes from prevailing-party status all plaintiffs who obtain only preliminary injunctions has no basis in the text or history of the statute or the precedents of this Court.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL., PETITIONERS

v.

T. A. WYNER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a party who fails to secure any relief on the merits of her claims is nonetheless a "prevailing party," for purposes of eligibility for an award of attorney's fees under 42 U.S.C. 1988(b), because she obtained a preliminary injunction at the beginning of the litigation.

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INTEREST OF THE UNITED STATES

This case concerns the proper construction of the phrase "prevailing party" in establishing eligibility for attorney's fees under 42 U.S.C. 1988(b). The Court's decision will likely govern fee awards not only under Section 1988(b), but also under numerous other fee-shifting statutes. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001). The United States has a substantial interest in the resolution of that question both because meritorious private actions can complement the government's own enforcement efforts under numerous statutes and because the United States itself may be liable for attorney's fees under similarly worded laws, see, *e.g.*, the Equal Access to Justice Act, 28 U.S.C. 2412. The United States has participated as amicus curiae in prior cases involving the proper interpretation of the phrase "prevailing party." See *Buckhannon*, *supra*; *Hewitt* v. *Helms*, 482 U.S. 755 (1987).

STATEMENT

1. Section 1988(b) of Title 42, United States Code, provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] * * * 1983 * * * of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. a. In mid-January 2003, respondent Wyner informed the park manager for the John D. MacArthur Beach State Park (Beach), that she intended to create a "temporary art installation" at the Beach on February 14, 2003, that would be "comprised of nude bodies in the

form of a peace sign." J.A. 16 ¶ 30. On February 6, 2003, the park manager concluded that "the nudity planned for [Wyner's] activities" was not "expressive conduct protected by the First Amendment," and that the State "has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity * * * is a reasonable manner restriction." J.A. 29; see Pet. App. 27a.[1] Wyner remained "free to conduct [her] activities, absent the nudity." J.A. 29; see Pet. App. 27a.[2]

On February 12, 2003, respondents, Wyner and George Simon, a videographer in Hawaii, filed a com-

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[1] By regulation, Florida law permits park managers to impose reasonable time, place, and manner restrictions on speech within state parks:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. * * * Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

Fla. Admin. Code Ann. R. 62D-2.014(18) (2005).

[2] A Florida regulation bans nudity within the limits of state parks, including its beaches:

> In every area of a park including bathing areas no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

Fla Admin. Code Ann. R. 62D-2.014(7)(b) (2005).

plaint against the head of the Florida Department of Environmental Protection and against the park manager in both his official and individual capacities. J.A. 10; Pet. App. 28a. The complaint alleged that Wyner "intends to conduct expressive activity in the future at this park which will include non-erotic displays of nude bodies" and that petitioners' proposed restrictions "chill[] Ms. Wyner's future plans." J.A. 17 ¶ 37. The complaint also asserted that Wyner "desires to engage in expressive conduct on Valentine's Day, February 14, by producing, directing, and participating in the display * * * of nude bodies in the form of a peace sign." *Ibid.* ¶ 34.[3]

The complaint charged that petitioners' proposed enforcement of the ban on nudity at her protest on February 14 would violate the First Amendment. J.A. 18 ¶ 39, ¶ 40. The complaint also charged that the Florida Administrative Code unconstitutionally "vests unfettered discretion upon the Park Manager," *ibid.* ¶ 41, and challenged both that code provision and the ban on nudity on their face and as applied to "expressive conduct at the beach," Pet. App. 3a. The complaint sought (i) injunctive relief against interference with the display on February 14 and "with future expressive activities that may include non-erotic displays of nude human bodies," (ii) declaratory and injunctive relief, and (iii) compensatory, nominal, and punitive damages. J.A. 18-19.

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[3] It is doubtful that respondent Simon has standing because he lives approximately 5000 miles away from the MacArthur Park Beach, and the complaint alleges only that he desired to observe a single display four years ago. See J.A. 12 ¶ 8, 17 ¶ 36; see also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (standing must exist at every stage of the litigation). There is, however, no dispute that Wyner has standing to maintain this action.

b. The same day that they filed their complaint, respondents filed an "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" to prevent petitioners from enforcing the ban on nudity at the "Valentine's Day protest" two days later at the Beach. J.A. 32. Although "disturbed" by the "exceedingly short notice," which had denied the court adequate time to read the relevant case law, J.A. 37, the district court held an emergency hearing the next afternoon. Petitioners participated by telephone, J.A. 36, explaining that "we are pretty [much] on short notice with this and we don't know much of what is going on." J.A. 38.

At the hearing, respondents introduced a number of exhibits that petitioners did not have and could not see. J.A. 53, 55-56. The court overruled petitioners' objections to their introduction "because of the time constraints." J.A. 56. With the caveat that the government officials who were available to participate in the emergency hearing by telephone "are not the people that know the facts all that well," J.A. 68, petitioners put on the testimony of the chief of operations for the Florida Park Service, who testified generally about the process for authorizing displays at the Beach. J.A. 70-78.

After the hearing, the district court granted the preliminary injunction in an oral decision. J.A. 93. The court explained that "I'm not prepared to rule at this point in the proceedings, * * * that the decision was necessarily made with respect to content, but there are a number of aspects about it that are worrisome." *Ibid.* The court also said that "it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests," and the viability of "those avenues can well be explored in this case." J.A. 94. The court further reasoned that the

"loss of First Amendment freedom for even minimal periods of time constitutes irreparable injury." J.A. 95. The court concluded that "the issues are somewhat difficult," and "I don't like to decide issues on this quick a basis, but I do feel like this meets the test of the injunction." *Ibid.*

In a subsequent written opinion, Pet. App. 9a-22a, the court reiterated that its ruling had rested on "the standards applied to a preliminary injunction motion," *id.* at 13a, and that the balance of harms would weigh in favor of permitting the allegedly expressive conduct to go forward, *id.* 15a; see *id.* at 14a. With respect to the "likelihood of success on the merits," *id.* at 19a, the court found that "some of the testimony received at the hearing indicates that content neutrality may not be present," *id.* at 17a, and that there may be "less restrictive alternatives," *id.* at 19a.

Wyner conducted her display on February 14, 2003, without interference from petitioners. Wyner and the other participants, however, did not remain behind the screen that petitioners had set up to shield the public from exposure to the nudity. Pet. App. 4a.

3. The district court subsequently granted summary judgment for petitioners on all claims and dismissed the complaint. Pet. App. 23a-48a. Noting that both parties had now "had an adequate opportunity to develop their arguments" and to make a "complete evidentiary record[ ]," *id.* at 45a, the court first held that petitioners were entitled to impose reasonable time, place, and manner restrictions on nudist expressive activity. *Id.* at 35a-36a. The court further held that the ban on nudity at the Beach was content neutral and furthered the "important and substantial government interest" in "protect[ing] the public from the 'offense' of nudity, and preserves

park aesthetics so that the 'entire park is open to all visitors during operating hours.'" *Id.* at 41a. The court determined that the ban was "no greater than is essential to further the government interest" because authorities had been "unable to ensure that those engaged in the expressive conduct stayed behind the screen," which made "a complete ban on nudity * * * necessary." *Id.* at 41a-42a. With respect to the as-applied challenge, the court denied relief because respondents had failed to identify "any particular facts to which the regulations can be applied," and accordingly treated the claim as only a facial challenge. *Id.* at 47a n.3.[4]

4. The district court granted respondents' application for attorneys' fees for their work obtaining the preliminary injunction. Br. in Opp. App. 1a-13a. The court reasoned that, while respondents had failed to establish any of their claims on the merits, they did succeed in preventing petitioners "from interfering with the temporary art installation planned for February 14, 2003," which the court characterized as "one of the primary purposes for filing this litigation." *Id.* at 3a.

5. The court of appeals affirmed the award of attorney's fees. Pet. App. 1a-8a. The court held that fees were warranted because the preliminary injunction "decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants," *id.* at 3a, and the court made no "mistake of law" in issuing the preliminary injunction, *id.* at 5a. The court accordingly held that respondents were prevailing parties

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[4] Respondents also sought damages, but the district court dismissed those claims on qualified immunity grounds. Pet. App. 29a-32a. Respondents' claim based on the Florida constitution had been dismissed at an earlier stage. J.A. 19 (Count II); J.A. 98.

even though "they were unable to achieve actual success on the merits." *Id.* at 7a-8a n.7.

SUMMARY OF ARGUMENT

Respondents filed a complaint seeking permanent injunctive and declaratory relief, as well as damages, for alleged violations of the federal and state constitutions. At the conclusion of the case, no constitutional violations were found, the defendants' regulations and their implementation were vindicated, and all relief was denied. As a matter of both common sense and precedent, respondents did not prevail; they lost.

That respondents, at the litigation's earliest stage, obtained an emergency and short-lived injunction does not transform them into prevailing parties. "The words 'preliminary' and 'prevailing' are not ones that easily fit together." *Select Milk Producers, Inc.*. v. *Johanns*, 400 F.3d 939, 962 (D. C. Cir. 2005) (Henderson, J., dissenting). A preliminary injunction is, by definition, only preliminary and temporary relief. The injunction was based not on a final resolution of the substantive merits of respondents' claims, but on a balancing of interests and a hurried prediction about the *potential* outcome of the case. The relief afforded respondents was transient and neither survived the conclusion of the litigation nor imposed any enduring, material change in the parties' legal relations. Parties that wish to convert a preliminary injunction into a full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2). But respondents did not make such a request; the time limitations that necessitated informal and truncated proceedings on an undeveloped factual record precluded such conversion; and the district court ultimately

did not embrace respondents' legal position on the merits.

Fundamental fairness precludes imposing fee liability on a fully vindicated defendant for a preliminary proceeding that, by its nature, denied the defendant an adequate opportunity to develop and present the controlling facts and law. Preliminary injunction proceedings frequently involve rushed judgments based on immature records, and the ordinary rules of procedure and evidence do not apply. Plaintiffs, moreover, have substantial control over the timing of requests for preliminary relief, the contours of the relief sought, and many of the critical facts on which the allegations rest. As a result, a defendant's ability to defend its position on the merits at that juncture is often substantially compromised and a hazardous indicator of ultimate success on the merits. What is more, determinations at this stage often turn on issues of irreparable injury, which may be inherently easy to satisfy for certain types of claims, yet may have little relationship to the ultimate likelihood of success on the merits. Nothing in the text of the attorney's fee provision, its legislative history, its purpose, or this Court's precedent suggests that Congress intended to saddle fully vindicated defendants—particularly state governments—with attorney's fees for such interim relief.

ARGUMENT

A PARTY WHO OBTAINS NO RELIEF ON THE MERITS OF ANY OF HER CLAIMS DOES NOT BECOME A PREVAILING PARTY SOLELY BY HAVING OBTAINED A PRELIMINARY INJUNCTION AT THE OUTSET OF THE LITIGATION

Like *Hewitt* v. *Helms*, 482 U.S. 755 (1987), "[t]his case presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of his

claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees," *id.* at 757. As in *Hewitt*, the answer to that question is not peculiar; the answer is "no." "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760.

The starting point for any claim of eligibility for attorney's fees is the "American Rule" that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Courts generally may not depart from that rule "absent *explicit* statutory authority." *Buckhannon Bd. & Home Care, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (emphasis added). Section 1988(b) contains no direction, explicit or otherwise, that courts should "go[] so far as to force a vindicated defendant," *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983), to pay for the burden of being subjected to an interim constraint by a plaintiff whose claims ultimately proved, upon full examination, to be without merit.

A. Respondents Are Not "Prevailing Parties" Because Fee Liability Depends Critically Upon Merits Liability

This Court has repeatedly admonished that "liability on the merits and responsibility for fees go hand in hand." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see *Farrar* v. *Hobby*, 506 U.S. 103, 109 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 763 (1989); *Supreme Court of Va.* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 738-739 (1980). Under Section 1988(b), like many other federal fee-shifting statutes, establishing "liability for violation of federal law" is "crucial" to rendering the defendant

responsible for attorney's fees, *Zipes*, 491 U.S. at 762; see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (presumption in favor of fees in civil rights cases depends critically upon the defendant "violating substantive federal law").

That "crucial connection" to merits liability, *Zipes*, 491 U.S. at 762, is missing in this case. Respondents filed suit and lost. Both counts of their complaint were dismissed. Pet. App. 46a; J.A. 18-20, 98. No constitutional violations were found. Pet. App. 23a-48a. Quite the opposite, the litigation fully vindicated the defendants' policies and practices. *Ibid.* No damages, declaratory judgment, or final injunctive relief was obtained. *Ibid.* In short, respondents did the very opposite of prevailing—they lost. "[W]here a defendant has not been prevailed against, * * * § 1988 does not authorize a fee award against that defendant." *Farrar*, 506 U.S. at 109; see *Hewitt*, 482 U.S. at 760. Only a party that is "legally responsible for relief on the merits * * * [should] bear fee liability," *Graham*, 473 U.S. at 164. Indeed, it would be "quite 'inappropriate'" and "a radical departure from longstanding fee-shifting principles adhered to in a wide range of contexts" for a court "to award the 'loser' an attorney's fee from the 'prevailing litigant.'" *Sierra Club*, 463 U.S. at 683, 684.

The court of appeals carved out an exception to that established rule for cases where a losing plaintiff obtains a preliminary injunction at the outset of the litigation, Pet. App. 2a-5a. That exception, however, lacks any anchor in statutory text, ignores this Court's precedent, and misconstrues the nature of such preliminary rulings.

B. Parties Who Obtain A Preliminary Injunction Do Not Prevail "On The Merits"

In *Buckhannon*, this Court held that a "prevailing party" means a party who had obtained either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." 532 U.S. at 604. Those forms of relief, the Court explained, embody the type of "'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Ibid.* Because there was no consent decree in this case, respondents are only eligible for attorney's fees if their preliminary injunction constituted a "judgment on the merits." It did not because a "judgment on the merits" means final relief on a litigated claim.

1. A party cannot "prevail" without final relief

Requiring a "judgment[] on the merits" gives meaning to the statutory command that only a "prevailing party" can obtain attorney's fees. *Buckhannon*, 532 U.S. at 603-604. "[P]revailing party" is "a legal term of art," that refers to "[a] party in whose favor a judgment is rendered." *Id.* at 603 (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). Importantly, at the time Congress enacted Section 1988(b), that legal term of art expressly conditioned "prevailing party" status on obtaining a favorable final or dispositive judgment. Only "[t]he party ultimately prevailing when the matter is finally set at rest" is a "prevailing party." *Black's Law Dictionary* 1352 (rev. 4th ed. 1968); see *ibid.* (defining "prevailing party" as the party "who *successfully* prosecutes the action or *successfully* defends against it") (emphases added). Indeed, that legal definition stressed that "prevailing party" status did not turn upon "the degree of success at different stages of the suit," but on

"whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it." *Ibid.*[5]

In granting a preliminary injunction, by contrast, a court does not issue any controlling judgment or "set at rest" the ultimate merits of the parties' legal claims. To the contrary, "[t]he two issues"—appropriateness of a preliminary injunction and resolution of the merits—"are significantly different." *University of Texas* v. *Camenisch*, 451 U.S. 390, 393 (1981). In issuing a preliminary injunction, a court does not decide that the plaintiff is "prevailing," has prevailed, or will prevail. At most, the court makes a prediction about "the likelihood that [the movant] ultimately would prevail," and even that is only one component in the court's multi-factor calculus. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).[6] Irreparable injury is another critical factor, yet satisfaction of that factor often is unrelated to ultimate success on the merits. Indeed, for some claims, like the First Amendment claim made here, courts routinely find that the irreparable injury factor is easily satisfied. See J.A. 95 ("[C]ourts have said that loss of First Amend-

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[5] See also *Black's Law Dictionary* 1069 (5th ed. 1979) (same). That same definition operated at the time Congress enacted the attorney's fee provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), on which Section 1988(b) was modeled, *North Carolina Dep't of Transp.* v. *Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 20-21 (1986). See *Black's Law Dictionary* 1412 (3d ed. 1933).

[6] See *Camenisch*, 451 U.S. at 393; see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982) (emphasizing the role of the public interest in equitable relief); *John T.* v. *Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (preliminary injunction does not support fees "because it is interim relief not based on the merits"); *Smyth* v. *Rivero*, 282 F.3d 268, 276 (4th Cir.), cert. denied, 537 U.S. 825 (2002).

ment freedom for even minimal periods of time constitutes irreparable injury."). What is more, a number of courts have held that, as the risk of irreparable injury increases, the need to demonstrate a likelihood of success decreases, which further widens the gap between actual success and the prediction that occurs at the preliminary injunction stage.[7]

Section 1988(b), however, predicates an award of attorney's fees on *actually "prevailing,"* not on a *prediction* about prevailing, made with variable degrees of confidence by different courts. The court of appeals, in other words, "improperly equate[d] 'likelihood of success' with 'success.'" *Camenisch*, 451 U.S. at 394; see *Doran*, 422 U.S. at 932. Here, the district court expressly rested the injunction on a balancing of interests and an explicitly tentative prediction—with which the court expressed discomfort, J.A. 95—that respondents had a likelihood of success on the merits. Pet. App. 16a-19a; J.A. 93-95. That preliminary evaluation of respondents' claim, moreover, was "not binding" when the dis-

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[7] See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 970 (1997) (per curiam) (court of appeals required only a "fair chance of success on the merits"); *Louis Vuitton Malletier* v. *Dooney & Bourke, Inc.*, 454 F.3d 108, 113-114 (2d Cir. 2006) ("serious question going to the merits"); *Smyth*, 282 F.3d at 276 ("substantial question"); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229-1230 (6th Cir. 1985) ("serious question"). Courts also consider whether the injunction is mandatory or prohibitory, or whether it would alter or preserve the status quo. Putting aside the inherent challenges in defining and applying such terms, see generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978), all of those factors at least offset, if not discount, the role of the likelihood of prevailing in the preliminary injunction analysis. Moreover, some claims by their very nature readily satisfy the irreparable injury factor without reference to how likely it is that the claim is meritless. See J.A. 95.

trict court ultimately decided the case "on the merits," *Camenisch*, 451 U.S. at 395, and thus cannot itself be characterized as a "judgment[] on the merits," *Buckhannon*, 532 U.S. at 604; see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("[A]ny conclusions reached at the preliminary injunction stage are subject to revision.").

"Congress is free, of course, to revise" Section 1988(b) to make "a substantial likelihood that the party requesting fees would have prevailed" the operative test, *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring), but it has not done so yet, and certainly has not done so "explicit[ly]," *id.* at 602 (majority op.).[8]

2. Precedent forecloses reliance on interim relief

Consistent with that statutory text, this Court's precedents establish that transitory relief obtained in the course of litigation, which does not survive the conclusion of the case, does not confer "prevailing party" status. In *Rhodes* v. *Stewart*, 488 U.S. 1 (1988) (per curiam), two prisoners obtained declaratory judgments invalidating a prison's magazine subscription policy. *Id.* at 2. They nevertheless were not deemed to be prevailing parties because, at the time those judgments were entered, neither remained in prison, which made the

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[8] Nothing in the legislative history detracts from the plain import of "prevailing." In fact, the cases the legislative history cites as fee-shifting models, see H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976) (citing, *inter alia*, *Bradley* v. *School Bd.*, 416 U.S. 696 (1974); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)); S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (same), involved attorney's fee awards based either on final decisions on the merits, *Bradley*, 416 U.S. at 699 & n.1, 722-724; *Mills*, 396 U.S. at 389-390, or consent decrees, see S. Rep. No. 1011, *supra*, at 5. See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 757 (1980) (per curiam) (discussing significance of *Bradley* and *Mills*).

declaratory relief of no continuing benefit. *Id.* at 4. The Court explained that a judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff" at the time the final judgment is entered. *Ibid.* Where intervening events moot the case "before judgment issue[s]," so that entry of final judgment "afford[s] the plaintiffs no relief whatsoever," *ibid.*, the plaintiffs have not prevailed and thus are ineligible for attorney's fees.

Like the declaratory judgments obtained by the plaintiffs in *Stewart*, the interim relief respondents obtained, which pertained to a single demonstration at a finite time, was mooted by the time judgment was entered in the case. At the end of the case, respondents had obtained no relief that, at that time or going forward, could "affect[] the behavior of the defendant[s] toward the plaintiff[s]." *Stewart*, 488 U.S. at 4. To the contrary, the district court here upheld the Florida regulations in their entirety.

Likewise, in *Hewitt*, the Court held that obtaining a favorable "interlocutory ruling" (a denial of a motion to dismiss) did not accord the plaintiff prevailing party status, because that interim ruling did not endure to final judgment and did not ultimately compel the defendant to give the plaintiff any relief in terms of damages or changed behavior. 482 U.S. at 760-761. Such transient successes—"even legal holdings en route to a final judgment," *id.* at 762—are "not the stuff of which legal victories are made," *id.* at 760.

And again, in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (per curiam), the Court held that favorable "procedural or evidentiary rulings" that arise in the course of a "disposition on the merits" are "not matters on which a party could 'prevail' for purposes of shifting his

counsel fees to the opposing party," *id.* at 759. Orders with such substantive impact as the reversal of directed verdicts or ordering a case to trial, *id.* at 756, 758, the Court held, will not even permit an *interim* award of attorney's fees, *id.* at 757-758, let alone a final award as a prevailing party. As long as a court or jury "may or may not decide some or all of the issues in favor of the [plaintiffs]," *id.* at 759, the plaintiff has not "established the liability of the opposing party," *id.* at 757, and thus has not "prevailed on the merits of at least some of his claims," and is ineligible for fees, *id.* at 758.

Given that *Hanrahan* precludes even an interim award of fees in advance of a judgment "establish[ing] the liability of the opposing party," 446 U.S. at 757, there is no basis for a final award of fees in a case where liability is completely absent. The preliminary injunction, like the favorable interlocutory rulings obtained by the plaintiffs in *Hewitt* and *Hanrahan*, neither "established the liability" of petitioners nor resolved a claim "on the merits," *Hewitt*, 482 U.S. at 760. Such an interlocutory decree "is not the end but the means," *id.* at 761, of ensuring the orderly resolution of civil litigation and preserving the court's ability to provide effectual relief if the plaintiff prevails. "[A] preliminary injunction is granted to a plaintiff to protect his interests *during the ensuing litigation*." *Withrow* v. *Larkin*, 421 U.S. 35, 43 (1975) (emphasis added).[9]

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[9] See also *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 317 (1999) (characterizing the question whether a preliminary injunction "should have issued when it did" as a "procedural issue" in the litigation); *Camenisch*, 451 U.S. at 395; *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status

The preliminary injunction thus serves as a device that courts employ "en route to a final judgment," *Hewitt*, 482 U.S. at 762, but is not itself a final judgment on the merits and it does not "settl[e]" the parties' dispute, *id.* at 761. Section 1988(b) requires, "at a minimum," that a party claiming to have prevailed "be able to point to a *resolution of the dispute* which changes the legal relationship between itself and the defendant, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis added); see *Farrar*, 506 U.S. at 111. Such resolution is an "absolute limitation" upon fee liability. *Garland*, 489 U.S. at 792.

3. The nature of a preliminary injunction proceeding is inappropriate for taxing attorney's fees

The "significant procedural differences between preliminary and permanent injunctions," *Camenisch*, 451 U.S. at 394, make the issuance of a preliminary injunction a particularly unsound basis for imposing attorney's fee liability. A defining feature of preliminary injunctions is the need for prompt judicial intervention and, as a result, they "are often harried affairs." *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 592 n.5 (1984) (Stevens, J., concurring in the judgment); see *Camenisch*, 451 U.S. at 395. In the case at hand, respondents filed their complaint and motion for a preliminary injunction 48 hours before the planned event, and the district court held a hearing on the application with less than 24 hours remaining. J.A. 36-37. Such time pressures can "deprive[] the defendant of valid defenses," *Hewitt*, 482 U.S. at 762, and can impair presentation of what limited evidence and arguments the de-

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quo and preventing the irreparable loss of rights before judgment.").

fense is able to muster on such short notice, see J.A. 68, 70 (defense unable to assemble the most informed officials for the hearing).

In addition, a preliminary injunction "is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395; see *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). Discovery is generally foreclosed, and Seventh Amendment jury trial rights are forgone. In this case, petitioners were forced to participate in the hearing by telephone, and the district court considered documentary evidence that petitioners could not see. J.A. 53, 55-56. Indeed, the preliminary injunction decision in this case arose on such extremely short notice and required such a "hastily arranged hearing" that the proceeding bore more similarity to a hearing for a temporary restraining order than for a preliminary injunction. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 434 n.7 (1974).

The Federal Rules of Civil Procedure underscore both the risk of error and the tentativeness inherent in the preliminary injunction decision by conditioning the issuance of a preliminary injunction upon "the giving of security * * * for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). That requirement "is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers." *Camenisch*, 451 U.S. at 397.[10]

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[10] Notably, despite the "presumptive rule for costs," *Buckhannon*, 532 U.S. at 606 n.8, there does not appear to be a consistent or historic practice of awarding costs to a party who obtained a preliminary injunction but then lost on the merits. The first federal statute

In short, when a court issues a preliminary injunction, "the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U.S. at 396. Indeed, the procedures are so truncated that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Id.* at 395; *Brown*, 411 U.S. at 456-457. Fundamental fairness requires that a defendant's liability on the merits or for attorney's fees not be affixed until it has had an adequate opportunity to present its side of the case, both on the facts and the law. Preliminary injunction proceedings simply are not designed to permit the type of thoroughgoing and conclusive consideration of the merits of each party's position needed to justify saddling the defendant with responsibility for attorney's fees—especially a defendant whose position, upon full judicial examination, has been upheld.

For plaintiffs who want an injunction based on the actual merits, Federal Rule of Civil Procedure 65(a)(2) provides an alternative mechanism. That Rule permits a district court to "order the trial of the action on the merits to be advanced and consolidated with the hearing

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regulating the award of costs and fees in federal court specifically limited awards in cases in equity to a "final hearing." Act of Feb. 26, 1853, ch. 80, 10 Stat. 161; see also *Avery* v. *Wilson*, 20 F. 856, 859-860 (C.C. W.D.N.C. 1884) (equity permits costs for a matter "completely disposed of by the court"); *Goodyear Dental Vulcanite Co.* v. *Osgood*, 10 F. Cas. 739 (C.C. D. Mass. 1877) (No. 5594) (applying "final hearing" rule); *Stimpson* v. *Brooks*, 23 F. Cas. 100, 101 (C.C. S.D.N.Y. 1856) (No. 13,454) (denying costs where "[t]he expenses in question accrued on a motion for a preliminary injunction, which was in no way conclusive upon either party as to the merits of the cause. * * * It is the costs on final hearing alone, which are by the statute chargeable.").

on the application" for a preliminary injunction. See also *Camenisch*, 451 U.S. at 395. The Advisory Committee Notes on the 1966 Amendment that added Rule 65(a)(2) express the view that "consolidation can be usefully availed of in many cases," and that, where appropriate, consolidation "should cause no delay in the disposition of the application for the preliminary injunction." That procedure, of course, will not be available when either time pressure or the undeveloped state of the record precludes consolidation, but that simply underscores that the grant of temporary relief under those circumstances was not "on the merits," Fed. R. Civ. P. 65(a)(2), and instead was granted with the understanding that full examination of the merits would follow.[11]

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[11] This case does not squarely present the question whether a preliminary injunction that serves as the catalyst for a permanent change in position by the opposing party renders the plaintiff a prevailing party when, due to mootness, no final judgment on the merits results. However, for many of the reasons stated in both *Buckhannon* and in this brief, there is no basis for carving out a preliminary-injunction exception to *Buckhannon*'s rejection of the catalyst theory. Indeed, the plaintiffs in *Buckhannon* had obtained an interim order, 532 U.S. at 624 (Ginsburg, J., dissenting); Pet. Br. at 3-4 & n.2, *Buckhannon*, *supra* (No. 99-1848), which permitted them to continue operating throughout the litigation, but neither they nor this Court ventured to rest prevailing party status on the combination of an interim order and a catalyst theory. Nor does the legislative history discuss instances of preliminary injunctions serving as catalysts. What does seem clear, however, is that, if the filing of a preliminary injunction request caused a government voluntarily to forgo enforcement of a statute until a permanent injunction hearing could be held, there would be no basis for awarding prevailing party status to the plaintiff who ultimately did not prevail on the merits. There is no greater basis for affording prevailing party status to a plaintiff who, although he obtains temporary relief from the court, ultimately does not prevail on the merits.

C. A Preliminary Injunction Does Not Effect A Material Change In The Parties' Legal Relationship

1. Briefly engaging in desired conduct does not suffice when no enduring relief is granted

The district court held that attorney's fees were warranted because performing the naked peace symbol display was "one of the primary purposes for filing this litigation." Br. in Opp. App. 3a. That is not enough. Prevailing party status depends on more than demonstrating that, after the complaint was filed, the plaintiff "g[ot] his way." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). That is because the "coercive effect of litigation on a defendant is by no means entirely dependent on the litigation's having merit." *Palmer* v. *City of Chicago*, 806 F.2d 1316, 1323 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987).

To be sure, respondents differ from the plaintiffs in *Buckhannon* in two respects. First, the statutory change that occurred in *Buckhannon*, 532 U.S. at 601, effected a more concrete, enduring, and far-reaching change in legal rights and obligations than the hours-long temporary adjustment compelled by the preliminary injunction in this case. But that difference, which was still not enough to trigger "prevailing party" status in *Buckhannon*, simply underscores the frailty of respondents' claim that they prevailed in any meaningful sense.

Second, the temporary alteration of circumstances in respondents' favor here, unlike in *Buckhannon*, was the product of a "judicial pronouncement." 532 U.S. at 606. But, as this Court's cases make clear, see Part B, *supra*, it takes more than a single favorable "judicial pronouncement" at the threshold of litigation to confer prevailing party status. Even a party who obtains a *perma-*

nent injunction will not be considered a prevailing party if that injunction is overturned or vacated on appeal, regardless of how much desired conduct that judicial pronouncement makes possible prior to the reversal.[12] Likewise, temporary restraining orders generally permit the requesting party to engage or avoid engaging in conduct, but courts have not rested prevailing party status on that temporary alteration of obligations.

Unquestionably, the preliminary injunction is an important judicial tool, and there is no gainsaying that it may secure highly desired (albeit temporary) relief sought by a party. Here, for example, the injunction permitted respondents to conduct a protest. But "prevailing party" status does not turn upon the practical value of a preliminary injunction to the movant.[13]

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[12] See, *e.g.*, *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 103 F.3d 720, 723-724 (8th Cir. 1997) ("A plaintiff cannot qualify as a prevailing party if the only basis for his claim of success on the merits is a judgment that has been reversed on appeal."); *Palmer*, 806 F.2d at 1320 ("[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it"); cf. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *Watson* v. *County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) ("[W]hen the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits * * * [t]he plaintiff would not be a prevailing party."), cert. denied, 538 U.S. 923 (2003); *NAACP* v. *Detroit Police Officers Ass'n*, 46 F.3d 528, 529-530 (6th Cir. 1995); *Smith* v. *University of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980) ("[J]ust because an injunction was issued properly does not signify that a defendant must incur the costs of its issuance when a court has eventually proclaimed him to be innocent of discriminatory conduct.").

[13] Of course, while the ability to go forward with the immediate protest may have been highly desired by respondents, that event also offered additional proof that the suggested less restrictive alternatives were not, in fact, effective.

More is needed and, because "fee liability runs with merits liability," *Graham*, 473 U.S. at 168, a favorable final—not interim—resolution of at least one of the plaintiff's claims is what Section 1988(b) requires. Unless and until the trier of fact "decide[s] some or all of the issues in favor of the respondents[,] * * * it could not seriously be contended that the respondents had prevailed." *Hanrahan*, 446 U.S. at 759. A plaintiff must "establish[] the liability of the opposing party" and must "prevail[] on the merits of at least some of his claims[,] [f]or only in that event has there been a determination of the 'substantial rights of the parties.'" *Id.* at 757-758.

In other words, "the plaintiff must be able to point to a *resolution* of the dispute which changes the legal relationship" between the parties, and it is that "material alteration of the legal relationship" that is the "touchstone of the prevailing party inquiry." *Garland*, 489 U.S. at 792-793 (emphasis added); see *Farrar*, 506 U.S. at 111. Indeed, *Bradley* v. *School Board*, 416 U.S. 696 (1974), which the legislative history of Section 1988(b) points to as a model for fee awards, see note 8, *supra*, held that "the existence of a final order [is] a prerequisite to the award," *id.* at 722. Achieving a desired benefit is not enough, see *Buckhannon*, *supra*; that achievement must be the product of actually succeeding on the merits of a claim, see *Garland*, 489 U.S. at 791-792; *Stewart*, 488 U.S. at 4.

That rule makes sense because the logical predicate for making a defendant finance the lawsuit filed against it is a determination that the defendant wrongfully violated federal law, and thus that the defendant should pay the cost of bringing its conduct into conformity with the law. But a preliminary injunction makes no definitive or conclusive finding about compliance with federal

law and, in fact, the enjoined defendant may be fully vindicated in the ensuing litigation.

Here, no violation of federal law was proven in court, and the defendants' conduct did not prompt a consent decree imposing a permanent, judicially sanctioned change in the parties' legal relations. Petitioners, in other words, did not "violate[] federal law," *Martin*, 546 U.S. at 137, and they "have not been found to have violated anyone's civil rights," *Zipes*, 491 U.S. at 762. Nothing in common sense, or the text, history, or purposes of Section 1988(b), or in "long-standing fee-shifting principles adhered to in a wide range of contexts" countenances "go[ing] so far as to force a vindicated defendant to pay the plaintiff's legal expenses," *Sierra Club*, 463 U.S. at 683, 685. The plaintiffs "left the courthouse emptyhanded," *Buckhannon*, 532 U.S. at 614 (Scalia, J., concurring), and "people who bring losing suits must bear their own attorneys' fees," *Palmer*, 806 F.2d at 1323.[14]

2. No as-applied challenge was resolved

Respondents cannot avoid that result by labeling the preliminary injunction proceeding an "as-applied" challenge to state law. See Pet. App. 3a; Br. in Opp. App. 4a. First, whether the underlying challenge was facial or as-applied does not change the fundamentally temporary

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[14] While a consent decree does not always include a formal admission of liability, the decree remains a final and enduring "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant,'" *Buckhannon*, 532 U.S. at 604; see *id.* at 618 (Scalia, J., concurring) ("[I]n the case of court-approved settlements and consent decrees, * * * [t]here is at lest *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*"). A preliminary injunction does not impose a similarly final determination of or enduring change in legal relations.

and non-conclusive character of the court's preliminary injunction ruling.

Second, a preliminary injunction that, as a practical matter, avoids having the statute applied to a particular event does not amount to a successful as-applied challenge to the *statute*. The latter requires a permanent injunction or other final relief on the merits. To ensure that the preliminary injunction proceeding resolved their as-applied challenge on the merits, respondents could have moved to consolidate the preliminary injunction hearing with the trial on the merits, see Fed. R. Civ. P. 65(a)(2). But they did not, choosing instead to seek temporary relief under the more forgiving likelihood-of-success-on-the-merits standard. Having enjoyed the benefits of that tactical decision, respondents cannot, after the fact, claim attorney's fees on the supposition that the injunction established actual, rather than predicted, liability on the merits.[15]

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[15] As a procedural matter, the record indicates that the February 14, 2003, event was a single manifestation, rather than the sum total, of the as-applied challenge. The complaint specifically alleged respondent Wyner's intention to engage in similar displays in the future, J.A. 17 ¶ 37, and, indeed, without such an allegation, Wyner would have lacked standing after February 14 to press the case forward. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). The respondents' challenge to the bathing suit regulation, moreover, appears to have been exclusively a challenge to the regulation as applied to expressive activity at MacArthur Beach. Pet. App. 3a. Respondents never argued, for example, that the bathing suit regulation was unconstitutional as applied to beachgoers who opposed wearing suits because of tan lines, rather than because of a desire to engage in expressive activity. Finally, respondents continued to press their as-applied challenges at the summary judgment stage, *id.* at 47a n.3, and lost that claim due to a failure of proof of any particular facts to which the regulations could be applied, *ibid.*

Nor is petitioners' decision not to appeal the preliminary injunction of relevance. Whether appealed or not, the preliminary injunction remained preliminary and could only have been reviewed as such, see *Camenisch*, 451 U.S. at 393-396.[16] Indeed, assuming an appeal could have been resolved in time to avoid mootness, the court of appeals would have reviewed the district court's balancing of equitable factors, including the likelihood of success, under an abuse-of-discretion standard of review, thereby compounding the gap between the preliminary injunction decision and the actual merits of the claim. See *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

Moreover, here, as is often the case when fees are sought under Section 1988(b) for equitable relief, the defendants are state officials charged with making litigation judgments in the public interest. Cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Given the precipitate timing of the injunction, state officials should not be penalized for concluding that compliance with the court's short-lived order would reflect a better application of governmental resources than seeking a highly disruptive emergency appeal that would have had to have been briefed and resolved within hours. Congress did not enact the attorney's fee statutes to proliferate the number of highly time-sensitive interlocutory appeals taken by governments for the sole purpose of protecting the public fisc from attorney's fee liability.

Finally, in permitting fees, the D.C. Circuit has stressed that a preliminary injunction is an independent and appealable "judgment" that accords favorable relief

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[16] See *Doran*, 422 U.S. at 932; cf. *United States* v. *United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-199 (1950) (failure to appeal temporary injunction does not make it law of the case).

to the movant. *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 949 (2005). That is true, but beside the point. Denials of sovereign and qualified immunity and certifications of class actions are also appealable,[17] but would not support an award of fees in the absence of a final favorable judgment on the merits. Fee liability requires not just a judgment, but a "judgment on the merits," *e.g.*, *Buckhannon*, 532 U.S. at 605, which a preliminary injunction is not. See *Select Milk*, 400 F.3d at 955-957 (Henderson, J., dissenting).[18]

3. No substantive legal issue was decided

The court of appeals granted prevailing party status because (i) "the preliminary injunction * * * decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants," and (ii) the injunction was not "based on a mistake of law." Pet. App. 2a-3a. Both grounds are flawed.

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[17] See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); Fed. R. Civ. P. 23(f); cf. 28 U.S.C. 1292(b).

[18] For the same reason, the fact that a preliminary injunction is enforceable through contempt does not render it a ruling on the merits. Contempt is simply a mechanism to enforce judicial orders that, like many judicial sanctions, "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 53 (1991). A "Contempt Order can be neither less 'interim' nor more 'merits-based' than the Preliminary Injunction itself." *John T.*, 318 F.3d at 559. Contempt proceedings, in fact, vindicate the court's authority, not the merits of the plaintiff's claims, and "are not [even] a part of the original cause." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911); see *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). And, of course, contempt is available to enforce a permanent injunction that is not stayed while the appeal is pending, but that does not entitle the plaintiff to attorney's fees if the injunction is reversed on appeal.

First, the preliminary injunction plainly did not "decide[] * * * on the merits," Pet. App. 3a, that state officials cannot arrest nude peace symbol participants. The summary judgment decision specifically held that officials can constitutionally enforce the ban on such demonstrations. *Id.* at 41a-45a. With respect to the February 14 demonstration , the district court was explicit that the preliminary injunction did *not* rest upon a final decision on the merits of the constitutional question, *id.* at 14a-15a, 19a, concluding that "I don't like to try to decide[] issues on this quick a basis, but I do feel like this meets the test of the injunction," J.A. 95.

In fact, the district court itself twice explained that the "driving force behind" its issuance of the preliminary injunction, Pet. App. 47a n.2; Br. in Opp. App. 4a n.2, was that it "perceived" a risk of discrimination based on Wyner's political message, *ibid.* That theory, however, had never been advanced by respondents in their pleadings, and arose entirely from the hurried telephonic testimony at the emergency hearing of a state official who did not "know the facts all that well." J.A. 68; see J.A. 70, 74. That concern completely evaporated upon examination at the summary judgment stage, after the parties had time to compile a proper evidentiary record and to develop their legal arguments fully, and after the court was afforded adequate time for deliberation on the constitutional questions presented. Thus, the record refutes the court of appeals' conclusion that the preliminary injunction proceeding resolved any substantive issue of law "on the merits."

Second, the court of appeals' emphasis (Pet. App. 3a-5a) on the absence of a mistake of law in the district court's preliminary injunction ruling misses the mark. Whether or not the district court applied the correct

legal test does not change the fundamentally tentative and qualified nature of its hurried examination of each parties' position and the competing equitable interests. At most, the existence of critical legal error would provide a *second* reason why the preliminary injunction did not support prevailing party status. But the issue for attorney's fee purposes is not whether the preliminary injunction should have issued; the relevant question is only whether the plaintiff prevailed on the merits.

The court's decision also overlooks that, in many cases, the legal rules are established and it is the proof of facts that makes all the difference. However, at the embryonic stage at which most preliminary injunction proceedings occur, factual development is nascent, and the "[d]ecisive facts may not emerge until discovery or trial." *Christiansburg Garment Co* v. *EEOC*, 434 U.S. 412, 422 (1978). That dearth of facts can be particularly debilitating to the defendant, who generally has little control over both the timing and the factual framework in which a preliminary injunction motion is presented and decided. The imbalance also exacts a toll on courts confronted with sensitive First Amendment questions. "The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate," and that problem is exacerbated when emergency relief deprives the court of "balanced analysis" and the time for "careful conclusions." *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). Furthering the imbalance, courts generally find that First Amendment claims, without regard to the merits, inherently satisfy the irreparable injury requirement, see J.A. 95, which in many circuits goes a long way to ensuring that temporary relief issues.

In this case, the preliminary injunction rested critically upon two mistakes of fact—the district court's perception of discrimination based on political content, Pet. App. 47a n.2; Br. in Opp. App. 4a n.2, and the court's assumption that less restrictive alternatives were available because respondent Wyner would perform behind a cloth barrier, Pet. App. 4a. Without the time pressures of the emergency motion and with the benefit of a developed record, both of those factual assumptions were proven to be incorrect. Nothing in the purposes of the attorney's fee provision, this Court's precedent, or logic justifies having prevailing party status turn upon whether it was a hurried-but-mistaken decision of law or a hurried-but-mistaken decision of fact that resulted in a now-vindicated defendant being temporarily enjoined at the outset of the case. What is critical is that the plaintiffs did not prevail on the merits; why they lost is largely beside the point.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Petitioners,

v.

T.A. WYNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE CENTER FOR INQUIRY, THE CENTER FOR PUBLIC REPRESENTATION, THE INSTITUTE FOR JUSTICE, LIBERTY LEGAL INSTITUTE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, PUBLIC CITIZEN, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public interest organization with more than 75,000 members nationwide. Americans United is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus* in many of the leading church-state cases decided by this Court. Americans United litigates cases throughout the country, many of which involve circumstances where a preliminary injunction is the only available means of relief.[1]

The Center for Inquiry is a nonprofit, educational organization headquartered in Amherst, New York, with offices in New York City, Washington, D.C., and Los Angeles. CFI is dedicated to promoting and defending reason, science, and freedom of inquiry. CFI and its affiliates have participated as a party or an *amicus* in litigation addressing freedom of religion, free speech, and other fundamental constitutional rights. In many of these cases, CFI seeks preliminary injunctive relief.

The Center for Public Representation is a public interest law firm that has been assisting people with disabilities for over thirty-five years. It is both a state and a nationwide legal center that provides assistance and support to public and private attorneys who represent people with disabilities, as well as federally funded protection and advocacy agencies in

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel have made a monetary contribution to the preparation and submission of this brief.

each of the fifty States. It routinely seeks preliminary injunctions on behalf of persons with disabilities to ensure that their constitutional rights, including their right to life-sustaining care, are protected.

The Institute for Justice is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice. Like the other *amici*, IJ on occasion seeks to recover attorneys' fees under 42 U.S.C. § 1988 when it successfully defends the rights enshrined in the United States Constitution.

The Liberty Legal Institute is a nonprofit law firm dedicated to the preservation of First Amendment rights and religious freedom. In its commitment to the protection of religious liberties of all faiths, the Institute represents religious institutions and individuals across the country.

People For the American Way Foundation is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 750,000 members and activists nationwide. PFAWF regularly represents parties and appears as an *amicus curiae* in constitutional and civil rights litigation. PFAWF has joined this *amicus* brief because it is critical to the ability of Americans to vindicate important constitutional and statutory rights that the availability of attorneys' fees to prevailing plaintiffs not be diminished.

Public Citizen is a nonprofit, consumer-advocacy organization with approximately 100,000 members nationwide. It appears before Congress, administrative agencies, and the courts concerning the enforcement of a

wide range of health, safety, environmental, and consumer legislation. Public Citizen has represented a party or filed an *amicus* brief in several cases before this Court on attorneys' fees, including *Scarborough* v. *Principi*, 541 U.S. 401 (2004); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department. of Health & Human Resources*, 532 U.S. 598 (2001); and *Kay* v. *Ehrler*, 499 U.S. 432 (1991).

The Rutherford Institute is an international, nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute joins this *amicus* brief because the prospect of attorneys' fee awards is crucial to maintaining and sustaining the Institute's mission of providing pro bono legal services.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici frequently find themselves on opposite sides of cases involving the interpretation of the Constitution and federal statutes. But they all have reached the same conclusion regarding the issue here: attorneys' fees are available under 42 U.S.C. § 1988 to plaintiffs who prevail in litigation by obtaining a preliminary injunction. *Amici* also agree that precluding fees in that situation would substantially narrow current law, burden the federal courts with lengthier and more costly litigation designed solely to establish a right to fees, and significantly chill the enforcement of constitutional and statutory rights.

Petitioners broadly argue that fee awards may never be premised upon winning a preliminary injunction. However, this case does not involve the typical context in which plaintiffs base entitlement to fees on obtaining a preliminary injunction. The plaintiff here won a preliminary injunction but ultimately lost at the permanent injunction stage. Much

more common is the situation in which, following entry of the preliminary injunction, the district court does not enter a final judgment on the merits because the case has become moot or the plaintiff has as a practical matter gained all of the relief sought in the complaint and therefore has no practical reason to press the claim further. In that context, fees should be available to a plaintiff who obtains a preliminary injunction as long as that injunction alters the legal relationship of the parties and provides relief to the plaintiff.

In many cases vindicating important federal rights, the *only* judicial relief available to the plaintiff may be a preliminary injunction. The defendant may capitulate after the issuance of a preliminary injunction, adopting new regulations or practices that moot a case or eliminate the plaintiff's incentive to proceed with the case. A preliminary injunction may also vindicate the plaintiff's claim with respect to a one-time event – such as a parade or meeting – and the case may end for the same reasons. Likewise, intervening factors may moot a case after a preliminary injunction has been issued but before the case is finally adjudicated. In all of these scenarios, the preliminary injunction provides the plaintiff with significant – as well as the only necessary or practically available – judicial relief; the district court never enters a final judgment on the merits.

This Court has identified two factors for determining whether a plaintiff's success in litigation confers prevailing party status. First, the plaintiff must obtain a judicially sanctioned "alteration in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Second, that judicial action must provide relief for the plaintiff. *Id.* at 603-04. Many preliminary injunctions fulfill both criteria. This Court accordingly should hold that, when there is no final ruling on the merits, a plaintiff who obtains a preliminary injunction is a prevailing party if the injunction

alters the legal relationship of the parties and provides relief to the plaintiff.

Awarding fees for a preliminary injunction promotes efficient resolution of claims; precluding fees would create perverse incentives to continue litigation solely to recover fees. Moreover, Congress intended fee-shifting to create incentives for attorneys to represent plaintiffs in cases vindicating important constitutional and statutory rights. Many such plaintiffs are represented by solo and small-firm practitioners, who rely on fee-shifting to be able to provide representation in these cases. Ensuring that fees are available for obtaining preliminary injunctions in appropriate cases is necessary to fulfill Congress's intent and to provide sufficient incentives for these attorneys.

When, as in the present case, the district court has addressed the merits of the plaintiff's claim, that judgment will generally supersede the preliminary ruling and determine which party prevailed. If the plaintiff loses on the merits, fees almost always will not be available for work done on the preliminary injunction. In rare cases, however, the final judgment may decide an issue different from that addressed at the preliminary injunction stage. When this occurs, fees should be available for the work done on the successful preliminary injunction.

ARGUMENT

A PLAINTIFF WHO OBTAINS A PRELIMINARY INJUNCTION MAY BE A PREVAILING PARTY ENTITLED TO ATTORNEYS' FEES.

Petitioners and the Solicitor General argue that obtaining a preliminary injunction is ***never*** sufficient to qualify a plaintiff as a prevailing party. Pet. Br. 19; U.S. Br. 11. In support of that broad contention, they point to language in *Buckhannon*, 532 U.S. at 605, suggesting that a prevailing party must obtain a final judgment "on the merits."

But this Court has made clear that a consent decree – which, by definition, is not a judicial determination "on the merits" – authorizes a fee award. *Maher* v. *Gagne*, 448 U.S. 122, 129-130 (1980); see also *Buckhannon*, 532 U.S. at 604. A plaintiff may be a "'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Hanrahan* v. *Hampton*, 446 U.S. 754, 756-57 (1980) (quoting H.R. Rep. No. 94-1558, at 7 (1976)).

This Court's holding in *Buckhannon*, therefore, did not turn on the absence of a final judgment "on the merits" but rather on the absence of a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605; see also *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (stating that a fee award requires judicial action that "changes the legal relationship between [the plaintiff] and the defendant"). The question here, therefore, is whether a preliminary injunction can constitute a "judicially sanctioned change in the legal relationship of the parties." It plainly can. Indeed, in most instances the very purpose of the preliminary injunction is to effect such a change.

By seeking a rule declaring that preliminary injunctions are categorically insufficient to establish prevailing party status, moreover, petitioners and the Solicitor General urge a dramatic change in the law. Eight courts of appeals have held to the contrary.[2] Abrogating the long-standing approach of

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[2] See, *e.g.*, *Coal. for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982) (Breyer, J.); *Haley* v. *Pataki*, 106 F.3d 478 (2d Cir. 1997); *Doe* v. *Marshall*, 622 F.2d 118 (5th Cir. 1980); *Webster* v. *Sowders*, 846 F.2d 1032 (6th Cir. 1988); *Palmer* v. *City of Chicago*, 806 F.2d 1316 (7th Cir. 1986); *Watson* v. *County of Riverside*, 300 F.3d 1092 (9th Cir. 2002); *Taylor* v. *City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987); *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939 (D.C. Cir. 2005). Only

these courts would significantly increase the burden on federal courts by providing plaintiffs with a strong incentive to prolong litigation ***solely*** to establish entitlement to fees. Further, such a ruling would undermine the incentives that Congress intended to provide for the vindication of constitutional and statutory rights.

Petitioners' blunderbuss approach also ignores the very different contexts in which preliminary injunctions are issued. Most awards of fees based on preliminary injunctions have occurred in cases where – unlike here – the district court never entered a final decision on the merits. In this context, as long as the preliminary injunction alters the legal relationship between the parties and provides some relief to the plaintiff, the plaintiff should be deemed a prevailing party under the fee-shifting statutes.

In contrast, when the district court does reject the plaintiff's claim on the merits, fees almost always should *not* be available for the work done in obtaining a preliminary injunction. The only exception would be the rare case in which the final decision addresses an issue different from the one resolved at the preliminary injunction stage.

A. When The District Court Never Enters A Final Ruling On The Merits, A Plaintiff Who Obtained A Preliminary Injunction Frequently May Qualify As A Prevailing Party.

This case does not present the typical context in which a plaintiff bases prevailing party status on obtaining a preliminary injunction. Here, the plaintiff won a preliminary injunction but ultimately lost at the permanent injunction stage. Much more typical is the situation in which the district court does not enter a final judgment on the merits because the case has become moot or the preliminary injunction has

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the Fourth Circuit disagrees. *Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002).

provided the plaintiff with all of the relief sought in the complaint so the plaintiff has no reason to continue to press his or her claim. Yet the broad rule proposed by petitioners and their *amici* would preclude fee awards for all preliminary injunctions, whether or not they are ultimately resolved on the merits.

We first discuss when a preliminary injunction may not be followed by a decision on the merits; we then explain why the text of Section 1988 and this Court's precedents make clear that fees may be available for work done in obtaining a preliminary injunction in that context; finally, we analyze the increased litigation burden on the federal courts, as well as the decreased incentives for enforcement of constitutional and statutory rights, that would result from adoption of the broad rule advocated by petitioners and their *amici*.

1. In Many Instances, A Preliminary Injunction Is The Only Effective Relief Available To A Plaintiff.

In many cases involving the enforcement of constitutional and statutory rights, entry of a preliminary injunction in the plaintiff's favor may effectively resolve the dispute. For example, a defendant who loses a preliminary injunction may decide that additional litigation is futile and cease the challenged conduct rather than litigate to a final judgment. Moreover, a preliminary injunction may be granted in a suit that pertains to a specific event – such as a parade or demonstration – and the case may become moot after the event takes place. Similarly, material circumstances outside a plaintiff's control may change and moot the case. For instance, a student who seeks relief from his or her school may graduate. In each of these circumstances, a preliminary injunction provides the plaintiff with substantial, as well as the only available, judicial relief.

a. Defendants Capitulate. A district court's decision to grant a preliminary injunction generally reflects the court's

belief that the plaintiff has a substantial likelihood of winning a final judgment. After losing at the preliminary injunction stage, defendants often reassess the validity of their position and may choose to cease the challenged conduct rather than continue litigating. The defendant may adopt a new regulation, repeal an ordinance, or alter a practice. In these circumstances, the preliminary injunction will have afforded the plaintiff all the relief that he or she sought. The case may become moot, or the plaintiff may have no practical reason to proceed with the litigation. Critically, and unlike the "catalyst" scenario considered in *Buckhannon*, the changes benefiting the plaintiff are the result of an enforceable alteration of the legal rights between the parties that has a "judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605.

For example, in *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939 (D.C. Cir. 2005), milk marketing cooperatives obtained a preliminary injunction prohibiting implementation of a new price regulation. Before final adjudication, the defendant withdrew the challenged rule, rendering the case moot. The D.C. Circuit held that the plaintiffs were prevailing parties because the "preliminary injunction effected a substantial change in the legal relationship between the parties and provided plaintiffs with concrete and irreversible relief." *Id.* at 946.

In *Taylor* v. *City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987), church members filed suit after learning that their church was the only religious group required by the defendant to obtain a solicitation permit in order to seek donations. The district court granted a preliminary injunction to enjoin the permit requirement. *Id.* at 1554. Before final adjudication, however, the city commission voluntarily repealed the challenged ordinance and the case became moot. *Id.* at 1555.

Finally, the plaintiffs in *Haley* v. *Pataki*, 106 F.3d 478, 481 (2d Cir. 1997), were legislative employees whose

salaries were excluded from an interim appropriations bill. The district court granted a preliminary injunction requiring the defendant to continue paying the plaintiffs. Before final adjudication, the defendants capitulated and agreed to payment of the plaintiffs' salaries, mooting the case. *Ibid.* Nonetheless, the preliminary injunction provided the plaintiffs with what they were seeking: a continued paycheck.

In each of these cases, the preliminary injunction gave the plaintiffs the relief they sought. The defendants' subsequent action provided that relief on a permanent basis, either eliminating any practical need for proceeding with the litigation, or mooting the case and denying the plaintiffs an opportunity for a final adjudication.

b. One-Time Events. Plaintiffs often come to court seeking a preliminary injunction to enjoin or allow a specific event. For example, a student may seek to prevent a school-sponsored prayer at a public-school graduation or to require a school to permit a religious group to meet; or citizens may seek a permit to gather to protest current events. Plaintiffs may learn that the defendant plans to engage in unconstitutional conduct only a short time before the event is scheduled to occur. In such a case, the district court typically cannot issue a final ruling on the merits, because there is inadequate time for a full trial or summary judgment proceeding. Instead, the plaintiffs' rights are determined solely at the preliminary injunction stage, because once the event has taken place, the case may be moot or the parties may have no interest in pressing the case further. Indeed, the Solicitor General observes that if the claim at issue here had related only to the one-time event of respondents' demonstration, "[respondents] would have lacked standing after [the event] to press the case forward." U.S. Br. 25 n.11.

For example, in *Jersey Central Power & Light Co.* v. *New Jersey*, 772 F.2d 35 (3d Cir. 1985), the plaintiff, a

public utility, sought a preliminary injunction after being denied permission to ship nuclear fuel through New Jersey. A trial court found that the state had violated the Hazardous Materials Transportation Act and granted the utility a preliminary injunction, allowing the shipment to go forward. The case then became moot because "[t]he offending conduct and thus the case for a[] [permanent] injunction dissolved with the subsequent completion of this unique shipment." *Id.* at 40. The plaintiff secured the *entire* relief sought through the preliminary injunction: the plaintiff was able to ship the nuclear fuel.

A similar situation occurs when an organization seeks a preliminary injunction to obtain a permit for a demonstration. In *Million Youth March, Inc.* v. *Safir*, 63 F. Supp. 2d 381, 395 (S.D.N.Y. 1999), the plaintiff won a preliminary injunction requiring the city to issue a previously denied parade permit. The injunction created a judicially enforceable change in the legal relationship between the parties; without the injunction, the plaintiff would not have been allowed to hold a protest. Following the event, the parties voluntarily dismissed the case.

Likewise, in *Coalition To Protest the Democratic National Convention* v. *City of Boston*, 327 F. Supp. 2d 61, 78 (D. Mass. 2004), the plaintiff obtained a preliminary injunction requiring the city to issue a parade permit allowing protests at the 2004 Democratic National Convention. Once the convention was over, the suit no longer presented a live controversy and was soon dismissed. Again, the plaintiffs changed their legal relationship vis-à-vis the city: only because the plaintiffs obtained a preliminary injunction were they allowed to demonstrate.

c. Intervening Factors. In some cases, after a court issues a preliminary injunction, the factual or legal circumstances may change and render the case moot.

Amicus Institute for Justice, for instance, is currently litigating a case that may soon become moot because of an intervening factor. On September 7, 2006, the plaintiffs filed a suit against members of the New Mexico Interior Design Board. They sought to enjoin the enforcement of a state law allowing unlicensed individuals to practice interior design but prohibiting them from using the description "interior designer" without a license. Complaint, *Franzoy* v. *Templeman*, No. 06-0832 (D.N.M. filed Sept. 7, 2006). The district court granted a preliminary injunction providing the plaintiffs with the entire relief they sought. *Franzoy* v. *Templeman*, No. 06-0832 (D.N.M. Dec. 11, 2006) (order granting preliminary injunction). However, following the preliminary injunction, the state legislature passed a statute repealing the licensing scheme. See S.B. 535, 48th Leg., 1st Sess. (N.M. 2007); H.B. 651, 48th Leg., 1st Sess. (N.M. 2007). That statute, currently awaiting the governor's signature, will moot the case by removing the threat to the plaintiffs' First Amendment rights.

Likewise, a case brought by a student plaintiff may become moot after the student graduates. In *Doe* v. *Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978), an emotionally handicapped student obtained a preliminary injunction allowing him to play on his high school's football team. The school district appealed the preliminary injunction, but during the pendency of the appeal, the football season ended and the plaintiff graduated. *Doe* v. *Marshall*, 622 F.2d 118, 118-19 (5th Cir. 1980). Although the case became moot, the plaintiff had obtained the entire relief his lawsuit sought.

In *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), a white male challenged the University of Washington Law School's affirmative action program after his application for admission was rejected. DeFunis obtained injunctive relief requiring the school to admit him. *Id.* at 314-15. Upon hearing the case, this Court learned that the school would allow DeFunis – who was then in his final term – to graduate even if the

school were to prevail and the injunction were vacated. *Id.* at 315-16. Accordingly, this Court dismissed the case on mootness grounds without ever reaching a final adjudication. Still, the injunctive relief ordered by the trial court – though never finally adjudicated on the merits – provided DeFunis with the entire relief that he had sought: a legal education from the University of Washington Law School.

Numerous other intervening factors may have a similar effect. In *Watson* v. *County of Riverside*, 300 F.3d 1092, 1093-94 (9th Cir. 2002), the plaintiff police officer was ordered to write a report about an incident in which he was accused of using excessive force. He requested a consultation with an attorney prior to writing the report, but his request was denied. He was ultimately fired. *Ibid.* The officer filed suit and obtained a preliminary injunction to prevent the county from using his report during the administrative appeal of his termination. *Ibid.* Nearly two years later, the district court dismissed his claims for damages, and, because the administrative process had long since concluded, the court held that the claim for permanent injunctive relief was moot. *Ibid.* Nevertheless, the preliminary injunction provided the entire injunctive relief the plaintiff sought: his report was excluded from the administrative proceeding. *Id.* at 1095-96.

In *Williams* v. *Alioto*, 625 F.2d 845 (9th Cir. 1980), the plaintiffs obtained a preliminary injunction that halted a San Francisco police action employing overt racial profiling. More than 600 individuals had been stopped on the street and frisked solely because they were black and generally resembled police sketches of a suspected murderer. *Id.* at 847. The police department appealed the injunction, but before the appeal was heard, the actual murderers were apprehended, convicted, and sentenced. The court of appeals dismissed the action as moot. *Ibid.* Nonetheless, the plaintiffs obtained the entire relief that they had sought: the police action was enjoined. See also *Grano* v. *Barry*, 783 F.2d 1104 (D.C. Cir. 1986) (injunction temporarily prohibiting the

destruction of a historical building pending the results of a ballot initiative rendered moot by the outcome of the election).[3]

2. *A Plaintiff Is A Prevailing Party In A Case Not Finally Resolved On The Merits If The Preliminary Injunction Alters The Legal Relationship Between The Parties And Provides Relief To The Plaintiff.*

Parties are generally required to bear their own attorneys' fees. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). In the context of claims to vindicate constitutional and statutory rights, however,

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[3] *Amici* recognize that a civil rights action is not mooted "so long as the plaintiff has a cause of action for damages." *Buckhannon*, 532 U.S. at 608-09. But damages are not always available in cases involving preliminary injunctions. First, compensatory damages are often unavailable because many plaintiffs are unable to show "actual injury" in a manner analogous to a tort injury, which is required for compensatory damages. See *Carey* v. *Phiphus*, 435 U.S. 247, 266 (1978). Second, nominal damages are unavailable when plaintiffs win a preliminary injunction that prevents any violation of their rights. It is precisely these cases – where the preliminary injunction prevents a prospective constitutional injury – that are often mooted after the window of potential injury passes. Third, plaintiffs may be barred from seeking both compensatory and nominal damages by sovereign immunity. See *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality opinion). Nor can the doctrine of "capable of repetition but evading review" offer much hope for keeping a case alive, because this doctrine "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). Finally, even if a plaintiff could extend a case – which is often impossible – this Court should not adopt a rule that would encourage plaintiffs to continue litigating otherwise-moot claims solely to obtain fees.

Congress has authorized fee-shifting in a number of statutes, including the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which was enacted in response to *Alyeska*.[4]

These statutes authorize fee awards to a "prevailing party," which this Court has interpreted to refer to a party "who has been awarded some relief." *Buckhannon*, 532 U.S. at 603. Plaintiffs who secure a preliminary injunction certainly fall within the plain language of the statute: they have prevailed on their claim for preliminary relief and thus have obtained "some relief," albeit not a final ruling on the merits.

To determine whether a plaintiff's success is sufficient for prevailing party status, this Court evaluates two factors. First, the plaintiff's success must change the legal relationship between the parties. *Id.* at 604. Second, the plaintiff must obtain judicial relief that is enforceable. *Id.* at 603-04. Some victories for the plaintiff – like successful final

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[4] While the present case involves 42 U.S.C. § 1988, Congress has adopted the "prevailing party" standard in many other fee-shifting provisions, including 7 U.S.C. § 2305(a) (Agricultural Fair Practices Act), 12 U.S.C. § 2607(d)(5) (Real Estate Settlement Procedures Act), 15 U.S.C. § 1129(2) (Anticybersquatting Consumer Protection Act), 15 U.S.C. § 6104(d) (Consumer Protection Telemarketing Act), 17 U.S.C. § 505 (Copyright Act), 18 U.S.C. § 924(d)(2)(A) (Firearm Owner's Protection Act), 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act), 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act), 29 U.S.C. § 794a(2)(b) (Rehabilitation Act), 33 U.S.C. § 1365(d) (Clean Water Act), 42 U.S.C. § 1973(e) (Voting Rights Act), 42 U.S.C. § 3613(c)(2) (Fair Housing Act), 42 U.S.C. § 2000e-5(k) (Equal Employment Opportunities), 42 U.S.C. § 6972(e) (Resource Conservation Recovery Act), 42 U.S.C. § 9659(f) (CERCLA), and 42 U.S.C. § 12205 (Americans with Disabilities Act). See generally *Marek* v. *Chesny*, 473 U.S. 1, 43-51 (1985) (appendix to opinion of Brennan, J., dissenting).

judgments and consent decrees – clearly meet these standards. *Maher*, 448 U.S. at 129-30; see also *Buckhannon*, 532 U.S. at 604. Other victories – such as securing a favorable ruling on a discovery issue or defeating a motion to dismiss – do not meet these standards because they fail to alter the legal relationship between the parties or to provide the plaintiff with judicially enforceable relief sought in the complaint. See *Hanrahan*, 446 U.S. 754.

Unlike either favorable final judgments on the one hand, or procedural victories on the other, preliminary injunctions are not categorically sufficient or insufficient for prevailing party status. Some preliminary injunctions alter the legal relationship between the parties and provide judicially enforceable relief. Others do not. Rather than adopt a blanket rule covering all preliminary injunctions, this Court should instruct lower courts to apply, on a case-by-case basis, the settled standards addressing whether a plaintiff is a prevailing party.[5]

a. To qualify as a prevailing party, a plaintiff must obtain an "alteration in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. Concurring in *Buckhannon*, Justice Scalia explained that the Court's holding focused on this alteration of the parties' legal relationship:

> The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-

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[5] That is the approach taken by the D.C. Circuit, which has read *Buckhannon* and other precedents to hold that a plaintiff who obtains a preliminary injunction is a "prevailing party" if three conditions are met: (1) "there has been a court-ordered change in the legal relationship between the plaintiff and the defendant," (2) a judgment has been rendered "regardless of the amount of the damages," and (3) judicial relief – more than a mere "judicial pronouncement" – has been granted. *Select Milk Producers, Inc.*, 400 F.3d at 947 (citing *Thomas* v. *Nat'l Sci. Found.*, 330 F.3d 486, 492-93 (D.C. Cir. 2003)).

> shifting statutes such as 42 U.S.C. § 1988, unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning.

Id. at 622 (Scalia, J., concurring). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship * * *." *Tex. State Teachers Ass'n*, 489 U.S. at 792-93.

To determine whether a judicial order alters the relationship between the parties, this Court has instructed courts to examine the order's effect:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. * * * The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt v. *Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). Accordingly, plaintiffs who obtain a judicial order changing their legal relationship vis-à-vis the defendant qualify as prevailing parties. In applying the "material alteration of the legal relationship of the parties" test, this Court has noted that "[a]pplication of the principles" to a particular case "is not difficult." *Tex. State Teachers Ass'n*, 489 U.S. at 792-93.

A preliminary injunction *may* fulfill this standard. The injunction may allow the plaintiff to take some action that the plaintiff otherwise could not take, or it may preclude the defendant from taking some action that the defendant otherwise would take. The injunction thus can alter the parties' legal relationship in a way favorable to the plaintiff. And because the injunction is issued by a judge, it carries the "judicial *imprimatur*" required by *Buckhannon*. 532 U.S. at 605. A plaintiff who obtains a preliminary injunction does not leave "the courthouse emptyhanded." *Id.* at 614 (Scalia, J., concurring).

But not all injunctions alter the legal relationship *between the parties*. The Court's decision in *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), illustrates this point. In *Rhodes*, prisoners sought injunctive relief claiming that they had a constitutional right to a particular magazine subscription. *Id.* at 2. The district court ultimately granted some relief. *Ibid.*[6] At the time that the district court issued its order, that court was not aware that one of the plaintiffs had died and that the other had been released from prison. *Id.* at 3. After these facts came to light, this Court denied a request for attorneys' fees because the district court's order failed to "affect[] the behavior of the defendant toward the plaintiff[s]" – the precise standard that *amici* urge. *Id.* at 4 (quoting *Hewitt*, 482 U.S. at 761). *Rhodes* therefore does not stand for the broad proposition the Solicitor General asserts (U.S. Br. 14-15) – that fees can never be awarded if a case becomes moot before final judgment – because the relief there was issued *after* the controversy had been mooted by intervening circumstances.

Contrary to the claim of petitioners and the Solicitor General (Pet. Br. 19; U.S. Br. 11), a litigant need not obtain a

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[6] Although the relief in *Rhodes*, 488 U.S. at 2, was described as "declaratory," this Court noted that the district court "ordered compliance" with "the proper procedural and substantive standards."

final judgment on the merits to qualify as a prevailing party. In *Hanrahan*, this Court adopted Congress's language in explaining that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" 446 U.S. at 756-57 (quoting H.R. Rep. No. 94-1558, at 7 (1976)). Thus, the Court has held that consent decrees – where there is no final adjudication of a plaintiff's legal claims – entitle a plaintiff to prevailing party status. *Maher*, 448 U.S. at 129-30; see also *Buckhannon*, 532 U.S. at 604 ("In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees."). Because fees may be available for consent decrees where there is no final judgment on the merits, prevailing party status *cannot* be contingent upon a final judgment on the merits. Rather, a plaintiff prevails by obtaining a judicially enforceable alteration in the legal relationship between the parties.[7]

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[7] A plaintiff who prevails on a preliminary injunction may both alter the legal relationship between the parties *and* obtain some relief sought in the complaint. That is in stark contrast to a plaintiff who merely succeeds on a motion or appellate proceeding that itself provides no relief to the plaintiff, even if it may alter the legal relationship between the parties. The Solicitor General's reliance on *Hanrahan* is therefore misplaced. In *Hanrahan*, the district court directed a verdict for the defendants, but the court of appeals reversed. The court of appeals' ruling merely remanded the case to the district court and allowed the case to proceed; it did *not* provide any of the relief that the plaintiffs sought in their complaint. Therefore, this Court's reversal of the court of appeals' decision – awarding fees to the plaintiffs solely for securing reversal of the dismissal – says nothing about the proper rule to apply when, as in the context of a preliminary injunction, the district court not only alters the legal relationship between the parties but also provides the plaintiff with relief sought in the

b. In addition to altering the legal relationship between the parties, a prevailing plaintiff must obtain some of the relief sought in the complaint and must obtain that relief from the court. "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Buckhannon*, 532 U.S. at 603 (quoting *Hewitt*, 482 U.S. at 760). Thus, in *Hewitt*, the plaintiff – who had obtained a judicial statement that his rights were violated but no injunctive relief or damages – was not a prevailing party because he had failed to obtain any actual relief. 482 U.S. at 760; see also *Coal. for Basic Human Needs* v. *King*, 691 F.2d 597, 600 (1st Cir. 1982) (Breyer, J.) ("The requirement that the legal success 'achieve some of the benefit the parties sought' merely distinguishes cases in which plaintiffs obtain some substantive relief from those in which the 'victories' are purely procedural.").

Preliminary injunctions in many instances provide the plaintiff with "some relief" sought in the complaint. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court."). Not only are preliminary injunctions *judicial*, but they constitute judicially *enforceable* relief: "[A] preliminary injunction has all of the force of a permanent injunction during its period of effectiveness * * *. [T]he sanctions of civil and criminal contempt * * * are available to punish any violation of a preliminary injunction." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 2d § 2947 (2007).[8]

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complaint. Indeed, *Hanrahan* accords fully with the rule that we suggest.

[8] Congress has recognized the significant effect of preliminary injunctions by permitting interlocutory appeals to be taken from district courts' decisions regarding preliminary injunctions. 28

The relief provided by preliminary injunctions is thus entirely different than the "catalyst" scenario addressed in *Buckhannon*. The *Buckhannon* Court stated:

> We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief.

Buckhannon, 532 U.S. at 606. The voluntary action taken by the defendant in *Buckhannon* was neither the product of judicial action nor judicially enforceable. A preliminary injunction is both.[9]

Not all preliminary injunctions, however, provide judicial relief "*towards the plaintiff*." *Hewitt*, 482 U.S. at 761 (emphasis in original). Some preliminary injunctions merely preserve the court's ability to provide the relief sought by the

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U.S.C. § 1292(a)(1). Every court of appeals requires the district court to assess the merits of the plaintiff's claim in granting a preliminary injunction. While "[t]he courts use a bewildering variety of formulations of the need for showing some likelihood of success – the most common being that plaintiff must demonstrate a reasonable probability of success," a key factor in granting a preliminary judgment is a court's assessment of "the validity of the applicant's claim." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 2d § 2948.3 (2007).

[9] Petitioners argue that *Buckhannon* implicitly rejected this claim because there was a preliminary order in that case. Pet. Br. 32-33. However, the *Buckhannon* plaintiffs did not attempt to justify their fee claim by reference to the parties' stipulated stay order. Indeed, they sought fees for the entire case, not just for the work associated with obtaining the stipulated stay order and therefore could not have relied on the existence of the stay order. Accordingly, *Buckhannon* simply did not address the issue before the Court in this case.

plaintiff if the court later decides that the relief is appropriate. Such injunctions do not afford relief *to the plaintiff*, a necessary condition for a plaintiff to be a prevailing party.

For example, in *Thomas* v. *National Science Foundation*, 330 F.3d 486 (D.C. Cir. 2003), the plaintiff claimed that an agreement between the National Science Foundation and a private contractor regarding Internet domain registration fees constituted an illegal tax because it had not been approved by Congress. The plaintiffs sought restitution of the fees, which were deposited into a fund to pay for future projects relating to the Internet. *Id.* at 488. The district court issued a preliminary injunction temporarily preventing the defendants from spending any money from the fund. *Ibid.* Ultimately, Congress passed legislation ratifying the fee system, which mooted the case. Although the plaintiffs obtained a preliminary injunction, the D.C. Circuit denied attorneys' fees because the injunction did not "afford[] appellees the relief they sought in their lawsuit." *Id.* at 493. The plaintiffs wanted restitution, but the injunction did no more than temporarily freeze the fund. It did not provide relief *to the plaintiffs*.

c. Petitioners and their *amici* advance several policy arguments to support a departure from this Court's long-standing approach to determining whether a party has prevailed. Petitioners first argue that "an interim order deprives defendants of the opportunity to convince the trial court or an appeals court to reverse its initial ruling"; they contend, therefore, that preliminary injunctions should not constitute a basis for a fee award. Pet. Br. 34; see also U.S. Br. 17-20. But in cases where the preliminary injunction is the sole available relief because the case is moot, plaintiffs are equally unable to convince a trial or appellate court that the ruling on the preliminary injunction was correct. It would be unfair to deny fees ***limited to work done in connection with the successful preliminary injunction*** when the litigation cannot continue to a final judgment.

Indeed, although both sides stake a claim for fairness, Congress provided the tiebreaker in passing Section 1988: Congress determined that defendants in constitutional suits are better positioned to pay for the cost of the litigation. See S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.").

One of the *amicus* briefs filed on behalf of petitioners explains: "To the extent that section 1988 is ambiguous, this Court has routinely construed the statute to advance its underlying objective of providing incentives to counsel to bring meritorious civil rights actions." Br. of Nat'l League of Cites, et al. 24 (citing *Kay* v. *Ehrler*, 499 U.S. 432, 436-38 (1991); *City of Riverside* v. *Rivera*, 477 U.S. 561, 577-78 (1986) (plurality opinion)). We agree. Any ambiguity with respect to prevailing party status should be interpreted in the plaintiff's favor.

Next, petitioners' *amici* suggest that awarding attorneys' fees to a plaintiff who succeeds in obtaining a preliminary injunction – but ultimately does not obtain a favorable ruling on the merits – would provide perverse incentives for plaintiffs to bring nonmeritorious claims or to moot cases strategically after winning a preliminary injunction. Br. Nat'l League of Cities, et al. 24-25. This argument ignores that what is at stake here is a party's *eligibility* for fees. The statute makes clear, and this Court has recognized, that district courts possess the discretion to make "equitable judgment[s]" regarding fee awards. *Hensley* v. *Eckerhart*, 461 U.S. 424, 436-37 (1983); see also 42 U.S.C. § 1988(b). If a plaintiff acts in bad faith by engaging in gamesmanship designed to obtain fees, the district court can and should exercise its discretion to reduce – or even deny – the fee award.

In sum, this Court's precedents and the language of Section 1988 require that fees be available for plaintiffs who obtain a preliminary injunction that changes the legal relationship between the parties and that provides the plaintiffs with some sought-after relief. "If the plaintiff has succeeded on any significant issue in litigation *which achieved some of the benefit the parties sought in bringing suit*, the plaintiff has crossed the threshold to a fee award of some kind." *Tex. State Teachers Ass'n*, 489 U.S. at 791-92 (citation and alteration omitted; emphasis added).

3. A Broad Rule Denying Fees To Plaintiffs Who Win Preliminary Injunctions Would Burden The Courts With Increased Litigation And Prevent Vindication Of Crucial Constitutional And Statutory Rights.

Allowing attorneys' fees pursuant to the rule we propose would promote judicial economy and effectuate Congress's intent to provide incentives for attorneys to represent individuals seeking to vindicate constitutional and statutory rights. Holding preliminary injunctions categorically insufficient to justify a fee award, on the other hand, would burden the federal courts with lengthier and more expensive litigation as well as severely undermine the policy interests underlying 42 U.S.C. § 1988 and other federal fee-shifting statutes.

a. Permitting fees for preliminary injunctions in appropriate cases provides incentives to resolve constitutional and statutory claims in a manner that efficiently employs scarce judicial resources. The rule advocated by petitioners, in contrast, would produce substantial ***additional*** burdens on the already-strained resources of the federal courts.

This Court has noted that "a request for attorney's fees should not result in a second major litigation." *Buckhannon*, 532 U.S. at 609 (quoting *Hensley*, 461 U.S. at 437).

Categorically denying fees for obtaining a preliminary injunction would encourage precisely that: plaintiffs who win a preliminary injunction would be forced to pursue claims for nominal damages simply to obtain attorneys' fees. Not only would this approach waste judicial resources by producing scores of "second major litigation[s]," but the legal fees of all parties would inevitably increase while they are litigating over nominal damages.

Ruling that some preliminary injunctions are fee-eligible, by contrast, would eliminate any incentive to continue litigating a case in which the legal issue has been effectively resolved. Shortening litigation decreases the burden on the courts as well as the costs to parties.

Moreover, preliminary injunctions themselves are judicially efficient. They are typically decided at the outset of a lawsuit, at which point both sides have expended relatively little time and few resources on the case. Accordingly, fees incurred in connection with preliminary injunctions necessarily will be lower than fees incurred if the litigation must be pressed through the merits stage.

Finally, allowing fees for preliminary injunctions encourages defendants to settle *before* a court adjudicates the preliminary injunction. As this court held in *Buckhannon*, a plaintiff is not fee eligible if a defendant voluntarily changes its behavior following the filing of a lawsuit but before the court grants any relief. When a defendant believes that the plaintiff is likely to prevail on a preliminary injunction, therefore, the defendant will have an incentive to resolve the dispute before the court issues a preliminary injunction in order to avoid liability for fees if the plaintiff wins the preliminary injunction and the defendant then capitulates. If, however, fees are no longer available based on the issuance of a preliminary injunction, defendants have every reason to take "one free shot" at litigating the preliminary injunction: they can capitulate following entry of the preliminary

injunction and still avoid liability for fees. That means courts will be burdened by more contested preliminary injunction actions – even in cases in which the defendant's chances of winning are remote.

b. Congress enacted Section 1988 and other fee-shifting statutes to enable plaintiffs to enforce their rights. "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate important Congressional policies which these laws contain." S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. As we have discussed, there are many cases in which the vindication of constitutional and statutory rights occurs solely through issuance of a preliminary injunction. Congress did not mean to exclude the enforcement of these rights from the incentive scheme provided by the availability of attorneys' fees.

Fee-shifting is particularly important in civil rights cases because most plaintiffs are represented by solo practitioners and "local, small-firm lawyer[s]," who must be able to obtain attorneys' fees in order to take these cases. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 767-69 (1988). Institutional litigators, such as *amici*, account for a minority of all constitutional cases. *Ibid.* (noting that "one theme in the literature that our data confirm is that most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity").

When institutional litigators do bring suits, moreover, they rely substantially on solo practitioners and small firms – who depend upon the availability of fee awards – to act as local counsel and co-counsel. See Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees To Work*, 69 Brook. L. Rev.

281, 283 (2003) ("[E]conomic incentives play a critical role in what litigation attorneys choose to pursue."); Carl Tobias, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485, 486 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income.").

In adopting Section 1988, Congress intended to create incentives to encourage solo practitioners and small firms to represent individuals seeking to vindicate constitutional and statutory rights:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. The "specific purpose [of § 1988] was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay*, 499 U.S. at 436; see also *Evans* v. *Jeff D.*, 475 U.S. 717, 732 (1986) (stating that fee-shifting statutes are part of the "arsenal of remedies available to combat violations of civil rights"). Indeed, in cases where a preliminary injunction is the only practical form of relief – such as cases relating to one-time events – it may be especially difficult to obtain counsel if fees are unavailable for work undertaken in obtaining the preliminary injunction.

Further, in cases involving preliminary injunctions, plaintiffs are generally focused on obtaining equitable, rather than monetary, relief. As we have discussed (see page 14 note 3, *supra*), suits vindicating constitutional rights – such as those involving the religion clauses, due process, free

speech, and free association – will often have little or no potential for a compensatory damages award. See *Carey* v. *Phiphus*, 435 U.S. 247, 266 (1978) (requiring a plaintiff seeking compensatory damages for a violation of constitutional rights to show "actual injury" analogous to tort injury); *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308-09 (1986) (same). In addition:

> While damages are theoretically available under the statutes covered by § 1988, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy.* Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

Rivera, 477 U.S. at 577 (quoting H.R. Rep. No. 94-1558, at 9 (1976) (emphasis in original)).

The plaintiff's attorney therefore often cannot obtain fees in constitutional rights cases through a percentage-of-recovery, contingency-fee agreement, because no compensatory damages can be awarded. The fee-shifting provisions of Section 1988 and similar statutes are typically the sole means for compensating attorneys in those cases.

If this Court were to adopt petitioners' rule denying fees across the board in these equitable cases, Congress's intent would be significantly undermined. Congress stated that "fee awards are essential if the Federal statutes * * * are to be fully enforced." S. Rep. No. 94-1011, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. To give effect to this clear intent, this Court should hold that plaintiffs who obtain at least some of their sought-after relief through a preliminary injunction may be prevailing parties entitled to fees. "The statutory policy of furthering the successful prosecution of meritorious

claims is better served by a rule that creates an incentive to retain counsel in every such case." *Kay*, 499 U.S. at 438.[10]

B. Except In Rare Circumstances, Plaintiffs Who Win A Preliminary Injunction Are Not Entitled To Fees If They Ultimately Lose The Case.

If a case progresses past a preliminary injunction and the plaintiff also prevails on a final judgment, then the plaintiff is entitled to recover reasonable attorneys' fees, including reasonable fees relating to the preliminary injunction. On the other hand, if the plaintiff wins a preliminary injunction but loses the same issue in a subsequent judgment, the later judgment supersedes the preliminary injunction and the plaintiff is not properly considered a prevailing party. See *Watson*, 300 F.3d at 1096 ("[T]here will be occasions when the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against him – a case of winning a battle but losing the war. The plaintiff would not be a prevailing party in that circumstance.").

For instance, in *Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982), a preliminary injunction was later supplanted because the court of appeals determined that the district court had granted the preliminary injunction through "a mistake of law." *Id.* at 1382. The later opinion meant that the plaintiff was not a prevailing party. Likewise, in *Palmer* v. *City of*

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[10] The availability of fees is also significant because the enforcement of constitutional rights is often unpopular. A student seeking to preclude prayer at a public high school commencement and a member of the National Socialist Party seeking a permit to march through Skokie may champion causes that are unpopular. But regardless of one's views about how the claims should ultimately be resolved, these plaintiffs raise important constitutional issues. Their lawyers risk ostracism, professional harm, and harassment. Limiting the availability of fees would weaken the incentives to undertake already unpopular litigation.

Chicago, 806 F.2d 1316 (7th Cir. 1986), the plaintiff obtained a preliminary injunction, but the injunction was later reversed on appeal. "[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it." *Id* at 1320. When the preliminary injunction is not the last judicial word on the issue decided, the later judicial holding determines which party prevails.

On rare occasions, however, the factual landscape of a case may evolve during the course of the litigation, and consequently the preliminary injunction may address issues quite different than those encompassed within the final judgment. Similarly, litigation may have multiple objectives that are addressed by the court at different times. For instance, an employer who has been preliminarily enjoined from maintaining a policy of refusing to hire women may elect to adopt a height and weight requirement that ultimately withstands judicial scrutiny. While the plaintiff may have lost on the merits with respect to the height and weight requirements, she would have prevailed on her claim regarding intentional gender discrimination.

Similarly, here, respondents should be deemed prevailing parties because, as they explain, the permanent injunction related to a claim distinct from that addressed by the preliminary injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Petitioners,
v.
T.A. WYNER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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42 U.S.C. § 1988 ..... 5, 15, 16, 18

42 U.S.C. § 15301 *et seq.* 8

Other Authorities

H. R. REP. NO. 94-1558 (1976) 4

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INTRODUCTION

Amicus curiae, the Brennan Center for Justice at New York University School of Law (the "Brennan Center" or "Amicus") respectfully submits this brief in support of the Respondents, and urges this Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit. The parties have consented to the filing of this brief, and their written consent is lodged herewith.[1]

INTEREST OF THE BRENNAN CENTER

Named for late Associate Justice William J. Brennan, Jr., the Brennan Center is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Dedicated in 1995 on Justice Brennan's 89th birthday, the Brennan Center was founded by scores of the Justice's former law clerks and the Brennan family and close friends as a living monument to the legacy of Justice Brennan. The Brennan Center frequently represents the indigent in litigation before federal and state courts. One of the stated missions of the Brennan Center is to help "ensure that low-income people have access to effective, enduring, and unrestricted legal assistance in civil cases."

The Brennan Center also helps protect the right of American citizens to vote and to have their votes counted under fair standards in free and open elections. The Brennan Center engages in research, legislative drafting and counseling, and public education on a wide range of issues related to voting rights and elections. It also litigates voting rights matters in the federal courts, where preliminary injunction proceedings can play the decisive role in enabling citizens to cast ballots and to have their votes counted.

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[1] Counsel for the parties did not author, in whole or in part, any portion of this brief. No person or entity, other than Amicus and its counsel, made any monetary contribution to the preparation or submission of the brief.

Because of the limited public and foundation funding available, the extent to which the Brennan Center will be able to represent clients in need will be affected by a limitation on the availability of attorneys' fees. As explained below, given the crucial role that preliminary injunction proceedings play in voting rights litigation, the ability of the Brennan Center to continue to litigate such cases may be adversely affected by any limitation on the availability of attorneys' fees for successful prosecution of a preliminary injunction. Such a limitation would also create perverse incentives for plaintiffs unnecessarily to expend resources in continuing litigation—even after obtaining appropriate relief—only to preserve their ability to recover statutory attorneys' fees. The Brennan Center has a strong interest in this case.

SUMMARY OF ARGUMENT

Fee-shifting statutes, like the one at issue in this case, were enacted by Congress to guarantee that important and fundamental rights could be vindicated in the federal courts. By allowing reasonable attorneys' fees to a prevailing plaintiff, fee-shifting statutes ensure that those without means will have meaningful access to justice in order to protect their rights in court.

Cases seeking to vindicate the right to vote and to political speech and participation lie at the very heart of the intended reach of the fee-shifting statutes. But Petitioners and the United States propose a rule that would undermine the effectiveness of Congress's scheme with respect to cases arising in the election context. They ask the Court to adopt a rigid rule that a party who successfully obtains a preliminary injunction cannot, without going on to obtain a final "judgment on the merits," qualify as a prevailing party for the purpose of a fee-shifting statute. In voting cases, however, a preliminary injunction is often not a prelude to some final relief, but instead represents all or a substantial part of the relief sought by a litigant. Indeed, often a preliminary injunction is the only relief that can be secured before the election itself

renders the case moot. In short, and as set out below in more detail, voting rights cases are a perfect example of why the rule proposed by Petitioners and the United States gives an unduly narrow meaning to the term "prevailing party," is inconsistent with this Court's cases construing the term, and is fundamentally unjust. The Court should reject that proposed rule and affirm the judgment below.

ARGUMENT

I. THE RULE PROPOSED BY PETITIONERS AND THE UNITED STATES SERIOUSLY THREATENS CONGRESS'S PURPOSE TO ENSURE ACCESS TO JUSTICE INCLUDING IN CASES SEEKING TO VINDICATE THE FUNDAMENTAL RIGHT TO VOTE

In this case, Petitioners and the United States as amicus curiae have proposed a rigid and unjust rule, inconsistent with the language and purpose of the statute at issue and with this Court's cases, which would significantly undermine the congressionally mandated recovery of attorneys' fees in civil rights cases. It would thus lessen the ability of persons whose rights have been violated to have access to the courts. The Brennan Center has a significant interest in this case, including as it relates to the judicial enforcement of the right to vote and the related rights of political speech and participation. Cases arising in the election context are a perfect example of why the rule proposed by Petitioners and the United States gives an unduly narrow meaning to the term "prevailing party," is inconsistent with this Court's cases construing the term, and is fundamentally unjust.

Given the timeline in which such cases are litigated—a timeline that is typically out of a plaintiff's hands—it is often impossible to obtain a full "judgment on the merits" that would resolve a controversy over how an election is to proceed. Relatedly, a final "judgment on the merits" may prove impossible to achieve due to events beyond a plaintiff's control. Instead, preliminary injunctive relief is often *the* critical

tool used by litigants to vindicate their own and others' right to vote in free and fair elections. Indeed, because of the firm deadlines necessarily involved in such cases (most obviously, the election itself, but also voter registration deadlines, printing of the ballots, certification of the election, etc.), preliminary injunctions are often the only way to ensure that this most fundamental of our rights is vindicated. To effectuate Congress's intent in enacting the fee-shifting statutes, therefore, this Court should affirm that plaintiffs prevailing on a preliminary injunction are entitled to their attorneys' fees as "prevailing parties," at least in the absence of a subsequent ruling that the preliminary injunction was wrongfully granted.

A. The Purpose of the Fee-Shifting Statutes Is to Guarantee that Important Rights, Including the Fundamental Right to Vote, Are Vindicated

Congress enacted fee-shifting statutes like the one at issue in this case in part to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H. R. REP. NO. 94-1558, p. 1 (1976)). To promote the "vigorous enforcement of modern civil rights legislation," Congress directed that civil rights litigants should not by their lack of resources "be deterred from bringing good faith actions to vindicate the fundamental rights" behind the civil rights statutes. H. R. REP. NO. 94-1558, at 6; S. REP. NO. 94-1011, at 4-5; *see generally Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402-03 (1968) (holding that "one who succeeds in obtaining an injunction under [the Civil Rights Act of 1964] should ordinarily recover an attorney's fee").

Congress recognized that such "private attorneys general" often "cannot afford legal counsel." H. R. REP. NO. 94-1558, p. 1 (1976). The fee-shifting statutes "cloak[the civil rights plaintiff] in a mantle of the public interest," H. R. REP. NO. 94-1558, at 6, and guarantee that publicly held rights are vindicated even where public servants are unable or unwilling to

protect them. Moreover, as federal courts have recognized, fee awards in civil rights litigation also "promote[ ] the[ ] continued existence" of public interest firms, and "help[ ] assure the continuing availability of the services to those most in need of assistance." *Torres v. Sachs*, 538 F.2d 10, 13 (2d Cir. 1976); *see also Copeland v. Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) ("Full fee awards to public interest law firms help finance their work. . . .").

Congress particularly sought to ensure that litigants who secure their fundamental right to vote by private litigation are able to seek their attorneys' fees, both to encourage the judicial vindication of such rights and to ensure that those without the means to otherwise litigate such rights are able to do so. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Congress has enacted numerous statutes protecting the rights of citizens to vote, including the rights of citizens to vote in elections free from invidious discrimination; at the same time, it has mandated that "prevailing parties" in judicial "actions or proceedings" regarding civil rights generally and voting rights in particular are entitled to seek their attorney's fees. *See* 42 U.S.C. §§ 1973(e) and 1988.

In doing so, Congress recognized the important role of the courts in enforcing constitutional provisions and statutes that guarantee equal voting rights and in ensuring that entrenched interests will not lock up the political system against the popular will.[2]

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[2] For example, in this Court's memorial proceedings for Amicus's namesake, Justice Brennan, the late Chief Justice Rehnquist noted the unique role of courts in election-related cases when discussing Justice Brennan's foundational decision in *Baker v. Carr*, 369 U.S. 186 (1961). Specifically, the late Chief Justice noted that before *Baker v. Carr*, "[m]alapportionment of State legislatures [ ] had been considered political questions . . . and while the Federal courts thus declined to address the

The general policies animating fee-shifting statutes are particularly apt, and indeed often magnified, in voting rights cases. Voting rights plaintiffs frequently will not have sufficient means or monetary incentive to pursue litigation seeking to vindicate their right to vote by retaining paid counsel. The lack of a market in votes or of serious financial injury from denial of the franchise means that significant monetary damages are generally unavailable to a voting rights plaintiff. Accordingly, unlike in many other types of litigation in which there exists an independent economic reason to bring suit, such as the availability of quantifiable monetary damages or the need to protect existing business interests, voting rights plaintiffs, like other civil rights plaintiffs, often lack the ability to negotiate terms of retention of counsel in the absence of a fee-shifting statute. The fee-shifting statutes thus play a critical role in promoting access to justice for citizens seeking to vindicate their right to vote.

Compounding the difficulties in obtaining access to justice in voting rights cases in the absence of fee-shifting statutes is the fact that voting rights litigation, even at the preliminary injunction stage, is complex, time-consuming, and resource-draining. Accordingly, despite efforts to encourage private lawyers to represent indigent clients, public interest groups, such as Amicus the Brennan Center, still handle a great bulk of this type of litigation.[3] A rule like that proposed

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problem, State legislatures were also unwilling to act, because those who benefited from the existing electoral system were the ones who were making the law." Chief Justice Rehnquist noted that *Baker* "took the first step in the direction of the now well-accepted practice of one person, one vote and in so doing changed the nature of American politics forever." *Proceedings in the Supreme Court of the United States in Memory of Justice Brennan*, 523 U.S. v, xlvii (1998) (Remarks of the Chief Justice).

[3] While the national major political parties often have both the incentive and resources to litigate election-law disputes, their own partisan interests may not coincide with the public interest, and voters may not find their interests aligned with either major political party, or indeed any political party. The Brennan Center has in the past represented minor parties trying

by Petitioners and the United States, which as explained below would greatly affect voting rights litigation, would therefore seriously undercut the ability of citizens to vindicate this important right in federal court.

B. In Voting Rights Cases, Preliminary Injunctions Often Are Both Necessary and Sufficient to the Vindication of Important Rights

Denial of the right to vote in a free and fair election constitutes an immediate, irreparable harm. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *Montano v. Suffolk County Legislature*, 268 F. Supp. 2d 254, 260 (E.D.N.Y. 2003). Preliminary injunctions therefore have played, and likely will continue to play, a vital role in vindicating this fundamental right. Indeed, in many voting rights and election-related cases, the decision on a preliminary injunction often will *entirely* resolve a discrete controversy over a question at issue and the relief to which a party is entitled, such as whether a particular election will go forward, whether an election already held was legitimate, whether voters or classes of voters will be permitted to vote and have their votes counted fairly, and whether candidates or issues will be on a ballot for a particular election at all. For this reason, the rule proposed by Petitioners and the United States—that a preliminary injunction does not represent sufficient relief to justify prevailing party status—is simply incorrect as to these types of cases.

For instance, in *Brown v. Chote*, 411 U.S. 452 (1973), a unanimous Court upheld a preliminary injunction that required the State to allow an indigent candidate for the U.S. House of Representatives to put his name on the ballot without paying a filing fee. *Id.* at 455-57. The relief ordered by

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to gain access to the electoral system, *see e.g., Green Party v. N.Y. State Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004), as well as nonpartisan groups challenging laws that benefit political parties, *see, e.g., League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006).

the preliminary injunction completely resolved a discrete controversy—whether the candidate could be on the ballot. *See also Cripps v. Seneca County Bd. of Elections*, 629 F. Supp. 1335, 1344 (N.D. Ohio 1985) (granting preliminary injunction compelling certification of an independent candidate for inclusion on the general election ballot).

Similarly, courts have granted preliminary injunctions to ensure compliance with the Voting Rights Act, 42 U.S.C. §§ 1973, *et seq.*, and the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301 *et seq.*, to prevent hostile and unequal treatment of minority voters at the polling place or ensure that persons are not unlawfully prohibited from casting ballots. *See, e.g., Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004) (injunction enforcing HAVA requirement that voters be given provisional ballots); *United States v. Berks County*, 250 F. Supp. 2d 525, 526 (E.D. Pa. 2003) (injunction to prevent intimidation of Spanish-speaking voters by poll workers). Each of these preliminary injunctions governed the conduct of a specific upcoming election and resolved the controversy over how that election would go forward.

Preliminary injunctions have opened the polls in specific elections to the disabled pursuant to the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq. See, e.g., New York v. County of Del.*, 82 F. Supp. 2d 12, 19 (N.D.N.Y. 2000); *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 26 (N.D.N.Y. 2000). They have also guaranteed non-English speaking citizens their right to vote before specific elections. *See Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606, 611-12 (N.D. Ill. 1972) (granting preliminary injunction giving Spanish-speaking Puerto Rican U.S. citizens voting information and voting assistance in Spanish), *aff'd*, 490 F.2d 575, 580 (7th Cir. 1973); *see also Torres v. Sachs*, 381 F. Supp. 309, 313 (S.D.N.Y. 1974) (noting earlier preliminary injunction granting similar relief); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974) (noting temporary restraining order granting similar relief). And resi-

dents of federal lands have used preliminary injunctions to vindicate their right to vote in non-federal elections. *See Cornman v. Dawson*, 295 F. Supp. 654, 659-60 (D. Md. 1969) (noting earlier preliminary injunction granted to permit residents of federal lands within the state to be registered in the county voter registry).

Preliminary injunctions have permitted pretrial prisoners to vote by absentee ballot. *See Murphree v. Winter*, 589 F. Supp. 374, 380, 382 (S.D. Miss. 1984). They have prevented officials from barring homeless persons from registering to vote. *See Pitts v. Black*, No. 84-5270, 1984 U.S. DIST. LEXIS 23331 (S.D.N.Y. Sept. 25, 1984).

Preliminary injunctive relief has also enforced Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by preventing cities from unlawfully increasing the number of seats on a city council. *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981).

For the most part, these decisions have completely resolved a discrete controversy regarding how an election will go forward, and represented a "judicially sanctioned change in the legal relationship" between the citizen-plaintiffs and the government-defendants. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). The change in relationship is the direct result of a court order enforceable through the contempt power of a federal court and therefore bears a "judicial *imprimatur*." *Id.* at 605 (emphasis in original). Thus, the party obtaining such an injunction is a "prevailing party" entitled to fees.

Given the nature of elections themselves, with a set deadline, evolving facts, and an often-changing regulatory scheme, there is frequently no other way for a plaintiff challenging an electoral rule to obtain the relief sought—for instance, the opportunity to cast a meaningful vote in a particular election—than by way of preliminary injunctive relief. Indeed, and contrary to the theoretical musings of the United States in its amicus brief that plaintiffs "have substantial control over the timing of requests for preliminary relief" (Brief of United

States at 10), voting rights plaintiffs are often forced by the conduct of the relevant government officials to seek relief on an expedited basis on the eve of an election. They do not have "control over the timing of [such] requests" and would prefer not to have to resort to legal action in the first place.

An example of a case where plaintiffs did not have "substantial control over the timing of" the request for a preliminary injunction is *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). There, the Sixth Circuit addressed the reach of the then-newly effective Help America Vote Act in the context of an appeal from a preliminary injunction entered against the defendant, Ohio's Secretary of State. The defendant did not issue regulations and guidelines announcing how the State would comply with HAVA until September 16, 2004, just a month and a half before the November 2, 2004, presidential election. *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 979 (N.D. Ohio 2004), *aff'd in part and rev'd in part by* 387 F.3d 565. On September 27, 2004, plaintiffs filed a complaint and request for a preliminary injunction requiring the Secretary to revise the adopted regulations and guidelines in a manner consistent with HAVA. *Sandusky County*, 387 F.3d at 570. The district court granted a preliminary injunction on October 14, 2004, and defendant filed a notice of appeal to the Sixth Circuit the next day. *Id.* at 571. The Sixth Circuit then affirmed in part and reversed in part on October 26, 2004—a week prior to the election—holding in part that the state was required by HAVA to permit voters to cast provisional ballots and defendant was not permitted to allow poll workers to refuse provisional ballots based on their own on-the-spot determinations that a particular voter was not in the correct precinct or was otherwise ineligible to vote. *Id.* at 574-75.

The *Sandusky County* case is a recent example of how voting rights cases involving preliminary injunctions often proceed. Facts on the ground begin to develop at a rapid pace as an election becomes imminent. Local officials may issue

regulations and directions for how a particular election is to go forward just weeks before an election. Such circumstances, completely beyond the control of the average voter, may necessitate litigation by a candidate, a voter or a class of voters who would be disenfranchised or otherwise adversely affected by the officials' actions. All of this litigation, including possible proceedings in the Courts of Appeals and even before the Justices of this Court necessarily must be resolved by a date certain: the election. *See, e.g., Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 543 U.S. 1304 (Nov. 2, 2004) (Souter, Circuit Justice); *Spencer v. Pugh,* 543 U.S. 1301 (Nov. 2, 2004) (Stevens, Circuit Justice). Similarly, controversies concerning whether and how to count certain votes must be resolved before the date an election must be certified. *See, e.g., Bush v. Gore,* 531 U.S. 98, 110-111 (2000).

C. It Is Often Impossible or Impractical to Secure Final Relief on the Merits in Voting Rights Cases

A preliminary injunction is sometimes the only relief practical or even possible in voting rights cases. A particular issue may have relevance only for one election, so that the election itself moots the plaintiff's stake in a dispute. Even if the case is not technically moot, in the interest of preserving judicial resources—and indeed, those of the litigants on both sides of the dispute—it is not in the public interest to demand litigation to final judgment in every case.

In certain election cases where a preliminary injunction is obtained, it may not be possible for the plaintiffs to obtain a final "judgment on the merits" beyond the relief requested by preliminary injunction. Because each election is a singular event involving candidates, issues, and conditions that may never recur again, mootness is a very real possibility for any litigation around election season. A case becomes moot, of course, when the parties no longer "'have a personal stake in the outcome of the lawsuit.'" *Lewis v. Continental Bank*

Corp., 494 U.S. 472, 478 (1990) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In any constitutional challenge to state regulations or statutes, a case may become moot after a preliminary injunction through the voluntary conduct of state actors, who may alter or rescind laws such that "the allegedly wrongful behavior could not reasonably expected to recur." *Friends of the Earth, Inc., v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). This danger is especially acute with respect to the laws governing elections, which have been subject in recent years to frequently changing federal and state regulatory schemes; regulations or procedures put in place for one election season may not last past that election. The changes in regulations or procedures may result from decisions made prior to that election, new technological developments, newly elected officials, or from officials' rational responses to preliminary injunctions. Regardless of the reason, a plaintiff who achieves a preliminary injunction vindicating her voting rights in a particular election may not be able to obtain further judicial relief if her case is mooted by a change in the applicable rules or procedures governing subsequent elections.

In addition, the singularity of elections will often place particular litigants outside of the exception for disputes that are "capable of repetition, yet evading review." *Lewis*, 494 U.S. at 481. A particular candidate, ballot initiative sponsor, voter, or even class of voters, will often have no "'reasonable expectation that [they] would be subject to same action again.'" *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)); *see, e.g., Independence Party v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (where preliminary injunctive "relief granted in the district court . . . was limited in its applicability to" specific primary election which had passed, appeal from it was moot and no exceptions to mootness doctrine applied). A voter who complains of a registration application that government officials initially refused to process before an election, for instance, will likely be registered for subsequent

elections. A candidate who complains of a ballot qualification procedure may not have any intention of running for office again. Once their cases become moot, these plaintiffs who obtained preliminary injunctions would be unable to secure final judgment, and under the rule proposed by Petitioners and the United States, unable to receive attorneys' fees as a prevailing party—despite the fact that they secured all the relief they sought.

Furthermore, a rule precluding the award of fees in election-related cases would create "inefficiency because plaintiffs who have succeeded on the merits [of a preliminary injunction] would be encouraged to rush forward with potentially unnecessary litigation, solely to preserve their entitlement to fees." *Palmetto Props. v. County of DuPage*, 375 F.3d 542, 550 (7th Cir. 2004); *see also Lewis*, 494 U.S. at 480 (warning against unnecessary litigation solely to preserve eligibility for fee awards). Furthermore, given the uncertainty as to whether government officials will change their conduct in reaction to a court ruling on a preliminary injunction, these inefficiencies would be increased as plaintiffs would have incentives to take actions to assure that their claims remain litigable rather than resolve issues with the defendants in order to preserve their right to fees. Creating such an incentive to continue to litigate a case after plaintiffs have vindicated their rights would not further the purpose of the fee-shifting statutes, but rather are not meant to encourage litigation as such, but are meant to encourage the vindication of federal rights. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (a "judicial decree is not the end but the means" to "some action (or cessation of action) by the defendant that the judgment produces"). Encouraging litigants to continue litigating a case only to preserve an entitlement to attorneys' fees would also be inconsistent with this Court's assertion in *Buckhannon* that it has "avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (quoting *Tex.*

State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989)).

Similarly, the United States' repeated suggestion that attorneys' fees should not be available because "[p]arties that wish to convert a preliminary injunction into a full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2)" is unpersuasive. (Brief of United States at 7, 19, 20, 25.) The suggestion reflects a lack of familiarity with the real world of litigation in the district courts, where voting rights proceedings must be brought before busy district judges who are unlikely to be able to clear their congested calendars on short notice for "a full-blown merits" trial just because a particular plaintiff "wish[es]" it (and wishes it just to retain the right to attorneys' fees, no less). Under the time pressure in which preliminary injunctions arise in many types of cases, including in voting rights cases, it is often impossible to hold "a full-blown merits" trial, even if a judge's calendar were clear. In any event, a prudent district judge may reasonably find, under many circumstances, that the interests in issuing a prompt order outweigh the interest in holding a "full-blown merits" trial. *See, e.g., Berks County,* 250 F. Supp. 2d at 527 ("The Court held a hearing on March 13, 2003 and has expedited the issuance of this Memorandum and Order [on March 18, 2003] so as to give the parties as much time as possible to prepare for the May 20, 2003 primary election.").

D. Petitioners' and the United States' Proposed Rule Would Frustrate the Purpose of the Fee-Shifting Statutes in Voting Rights Cases and Is Contrary To Congressional Intent

Because cases arising in the election context are frequently resolved by preliminary injunction and are often impractical or impossible to litigate through to final judgment, the rule proposed by Petitioners and the United States would seriously jeopardize the availability of fees in voting rights

cases. This in turn would discourage their litigation, contrary to the intent of Congress in enacting fee-shifting statutes.

As explained above, preliminary injunctions play a crucial and sometimes decisive role in resolving controversies regarding the rights of citizens to vote in a free election. Thus, were the Court to strip litigants of the ability to obtain fees for vindicating the right to vote in hard-fought preliminary injunction proceedings, it would seriously threaten the ability of plaintiffs to recover fees in whole classes of voting rights litigation, where litigants succeed in protecting the right to vote in particular elections. Without the ability to recover fees for voting rights matters, public interest firms and pro bono attorneys would have to be even more selective than they already are in allocating their resources and deciding which cases to pursue. They would be less likely to pursue cases where the law is unclear, even if the public would benefit by a judicial ruling on the scope of a citizen's rights. The Court should not go down this path.

This Court last addressed the question of the proper construction of the term "prevailing party" in its decision in *Buckhannon*, 532 U.S. at 598. A preliminary injunction governing how an election will be conducted or determining whether citizens will be permitted to meaningfully cast a vote at all meets the terms of that decision. It is a "judicially sanctioned change in the legal relationship" of the citizen-plaintiffs and the government-defendants. *Id.* at 604. The change in relationship is the direct result of an injunction enforceable through the contempt power of a federal court and therefore bears a "judicial *imprimatur*." *Id.* (emphasis in original). Thus, the party obtaining such an injunction is a "prevailing party" entitled to fees.

Petitioners and the United States, however, ask the Court to depart from the statutory text and statements of legislative purpose and instead graft onto these touchstones of positive law a judicially created requirement of "final judgment on the merits." As to the language of the statute, this Court has clearly declared: "*Nothing* in the language of § 1988 condi-

tions the District Court's power to award fees on *full litigation of the issues . . .*" *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (emphases added) (upholding fees where plaintiffs settled and obtained a consent decree). Indeed, on this point, the Court in *Maher* was unanimous. *See id.* at 134 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (agreeing with conclusion that "the award of attorney's fees under § 1988 does not require an adjudication on the merits of the constitutional claims").

The United States argues that plaintiffs who have succeeded in securing preliminary injunctions but whose cases are subsequently rendered moot should not be entitled to their fees because a fee award would, purportedly, constitute a "preliminary injunction exception to *Buckhannon*'s rejection of the catalyst theory." (Brief of United States at 30, n.11.) This misreads *Buckhannon*. That *judicial* action may be characterized as a "catalyst" for a change in behavior by government officials does not mean that the award of fees for securing that judicial action is an endorsement of the specific "catalyst theory" discussed in *Buckhannon*, which rested on the *lack* of judicial action. *Buckhannon*, 532 U.S. at 605. The catalyst theory rejected in *Buckhannon* would have permitted the award of fees based on the voluntary change in behavior by government officials "where there is *no judicially sanctioned change* in the legal relationship of the parties." *Id.* (emphasis added). Indeed, a final judgment and permanent injunction compelling conduct by government officials will, quite literally, be a "catalyst" for the government officials to change their conduct in the sense that the change is required by court order. The award of fees in such cases where *judicial action* compels a change in conduct, however, cannot be characterized as an "exception to *Buckhannon*'s rejection of the catalyst theory."

In a situation where a party prevails on a preliminary injunction, and the government then changes its behavior in reaction to that judicial ruling, the change in behavior is not "voluntary" as understood by the "catalyst theory" set forth in

Buckhannon. Rather, such a change in conduct clearly has the "judicial *imprimatur*" missing from the rejected "catalyst theory." In such situations "[t]he relief . . . ultimately won," the preliminary injunction, "was specifically the relief . . . requested" notwithstanding the subsequent "voluntary" mooting of the case. *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999) (awarding attorneys' fees to prevailing plaintiffs after successful challenge by preliminary injunction to initiative governing campaign contributions, and rejecting argument that government's mooting of the case by repealing the initiative in response to preliminary injunction precluded the fee award). *See also Palmetto Props.*, 375 F.3d at 551 (where district court entered preliminary injunction enjoining enforcement of statute, and city then mooted case before final judgment in district court by repealing statute, parties are "prevailing parties" entitled to fees). To condition fees on "final judgment on the merits" would be unjust and contrary to Congress's intent.

As demonstrated above, preliminary injunctions play a vital role in ensuring that all citizens have the right to vote in a free, fair, and open election. For voting rights plaintiffs who face impending elections, certifications, or registrations, the preliminary injunction vindicating their rights is a clear legal victory: it provides the very enfranchisement of which they would otherwise have been deprived. *See Sandusky County Democratic Party v. Blackwell*, 191 Fed. Appx. 397, 399-401 (6th Cir. 2006) (affirming award of attorneys' fees to "prevailing parties" who obtained pre-election preliminary injunction).[4] The parties in such a proceeding have prevailed

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[4] While a stipulated permanent injunction was eventually entered in the *Sandusky County* case after the election, *see Sandusky County Democratic Party v. Blackwell*, No. 04-5782 (order granting permanent injunction) (Dec. 29, 2004), the rule proposed by Petitioners and the United States would create incentives for future defendants to refuse to enter into final settlement decrees in cases that are largely resolved by a preliminary in-

and have obtained all the relief that they want as to a particular election, which may be all they seek. Other plaintiffs may have received at least "some of the relief they sought" in the litigation in general. *Tex. State Teachers Ass'n*, 489 U.S. at 793 ("[Plaintiffs] prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus 'prevailing parties' within the meaning of § 1988."). But once an election transpires, that litigation may be impossible or impractical to follow through to final judgment, and to require that to happen before fees will be awarded would subvert Congress's intent. In addition to prevailing on the discrete controversy of how a particular election should proceed, the successful plaintiff in such cases has fulfilled the role of private attorney general and vindicated an important federal interest in ensuring that our elections are legitimate and viewed as such, and that the fundamental rights of citizens are protected.

This Court should affirm that plaintiffs prevailing on the difficult task of securing a preliminary injunction are indeed entitled to their attorneys' fees as "prevailing parties."

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junction, if the absence of a final judgment would defeat a subsequent motion for fees.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

MICHAEL W. SOLE AND TERENCE COULLITTE,

Petitioners,

v.

T.A. WYNER AND GEORGE SIMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

~~MOTION FOR LEAVE TO FILE AMICUS BRIEF AND~~
BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF RESPONDENTS

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MOTION AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3(b) of the rules of this Court, the Center for Individual Rights ("CIR") moves for leave to file a brief *amicus curiae*. Petitioners have not consented to the filing of a brief by CIR.

CIR is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, especially those involving students in college and high school, including *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) and *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006).

CIR believes that the standard set forth by petitioners and their amici would have a devastating and altogether inappropriate effect on student speech cases, which, by their nature, are prone to becoming moot when the plaintiffs graduate from school. The *Sypniewski* case is an excellent example of this phenomenon, and is described in detail below. Petitioners and their amici would deny "prevailing party" status to plaintiffs in student speech cases who "prevail" in any common or sensible use of that term. CIR submits this amicus brief to alert the Court to this consequence of petitioners' argument.[1]

STATEMENT OF THE CASE

CIR adopts the statement of the case provided by respondents.

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[1] Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

THE SYPNIEWSKI CASE

The incident that precipitated the *Sypniewski* lawsuit was Thomas Sypniewski's suspension for wearing a Jeff Foxworthy T-shirt to high school on March 22, 2001. The humorous T-shirt identified the "Top 10 reasons you might be a redneck sports fan." *Sypniewski*, 307 F.3d at 249-50. Thomas was suspended for violating the School's Dress Code policy, which prohibited, *inter alia*, clothing "portraying racial, ethnic, or religious stereotyping." *Id.* at 250 n.6. Thomas's brother, Brian, was a middle school student, and wore his Foxworthy t-shirt the day after Thomas was suspended. *Id.* at 251. Although no action was taken against Brian, when the Board of Education denied Thomas's appeal of his suspension, it stated that the failure to take action against Brian had been a mistake. *Id.*

Thomas and Brian, and their brother Matthew, commenced a lawsuit on June 25, 2001. At that time, Thomas already had graduated high school, Matthew had just completed his freshman year, and Brian was going to enter high school that fall. *Id.* at 246 n.1. At the same time that they filed the complaint, Matthew and Brian filed a motion for a preliminary injunction seeking to enjoin the application of the Dress Code, and a separate Policy On Racial Harassment And Intimidation (the "Racial Harassment Policy"), to the Foxworthy T-shirt. (The Racial Harassment Policy prohibited the wearing or possession of items "depicting or implying racial hatred or prejudice" or that "is racially divisive or creates ill will or hatred." *Id.* at 249.)

Defendants filed their brief in opposition to the preliminary injunction motion about six weeks later, on August 7, 2001, and oral argument was held on August 15, 2001. Docket in *Sypniewski v. Warren Hills Regional Bd. of*

Educ., D.N.J. Civ. No. 01-30614 (hereinafter "*Sypniewski* District Court Docket") (Doc. Nos. 12-14, 20); *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Civ. No. 01-3061, slip op. at 1 (D.N.J. filed Sept. 4, 2001). The district court issued its opinion on September 4, 2001. The district court denied the motion for a preliminary injunction with respect to the Racial Harassment Policy and its application to the Foxworthy T-shirt, but held that the challenged parts of the Dress Code might not satisfy constitutional muster and suggested that it should not be enforced prospectively during the litigation. *Id.* at 2, 87. An order denying the motion for a preliminary injunction was entered on September 7, 2001. *Sypniewski* Dist. Ct. Docket, Doc. No. 22. Matthew and Brian filed their notice of appeal three days later. *Id.*, Doc. No. 23.

Matthew and Brian moved in the Third Circuit for a preliminary injunction pending appeal and expedited briefing on September 21, 2001. Docket Sheet in *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Third Cir. No. 01-3542 ("*Sypniewski* 3d Cir. Docket"). In an order dated January 4, 2002, the Court of Appeals granted the motion to expedite the appeal (to which defendants had consented), but denied the motion for a preliminary injunction pending appeal. *Id.* Since the briefing was almost completed at that time, the motions panel ordered the matter to be listed before the next available panel. The appeal was argued before the Third Circuit on March 4, 2002. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d at 243; *Sypniewski* Third Cir. Docket.

Some 7 months later, on October 3, 2002, the Third Circuit issued its opinion reversing the district court in part. Specifically, the Court concluded that the District Court had erred in failing to enjoin application of the Racial Harass-

ment Policy to the Foxworthy t-shirt and failing to enjoin that policy to the extent that it permitted the regulation of speech that "creates ill will." *Sypniewski*, 307 F.3d at 269. The school board filed a petition for hearing and suggestion for rehearing en banc on October 17, 2002. *Sypniewski* Third Cir. Docket. The Third Circuit issued an order denying that petition on October 29, 2002, and mandate was issued on November 6, 2002. *Id.* The District Court entered a preliminary injunction based on the Third Circuit's opinion on November 25, 2002. *Sypniewski* Dist. Ct. Docket (Doc. No. 38). At that time, Matthew was a junior in high school and Brian was a sophomore.

The school board filed a petition for a writ of certiorari with this Court on January 27, 2003. Supreme Court Docket in *Warren Hills Regional Bd. of Educ. v. Sypniewski*, Sup. Ct. No. 02-1328. This Court denied that petition on May 19, 2003. *Warren Hills Regional Bd. of Educ. v. Sypniewski*, 538 U.S. 1033 (2003).

Upon return to the District Court, a discovery and scheduling order was issued. Plaintiffs moved for partial summary judgment on various claims on October 5, 2004. *Sypniewski* Dist. Ct. Docket, Doc. No. 50. Defendants did not oppose that motion to the extent it sought some word changes in the Dress Code and the striking of the words "ill will" in the Racial Harassment Policy. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, Civ. No. 01-3061, slip op. at 12-13 (D.N.J. filed Feb. 7, 2005). The court denied all of the rest of plaintiffs' motion for summary judgment, concluding, for example that there were issues of fact as to whether the Board had violated Thomas's rights when it suspended him for wearing the Foxworthy t-shirt. *Id.* at 13.

Matthew graduated from Warren Hills Regional High

School in June 2004 and Brian did the same in June 2005. They apprised the district court of this pursuant to their duty of candor, and, in November 2005, moved to dismiss voluntarily their remaining claims (including damages claims for Thomas, which he no longer wished to pursue). The district court granted that motion in January 2006. *Sypniewski v. Warren Hills Regional Bd. Of Educ.*, 2006 WL 208562 (D.N.J. Jan. 26, 2006).

The Sypniewskis then moved for attorneys' fees pursuant to 42 U.S.C. § 1988. The district court concluded that plaintiffs were "prevailing parties," focussing significantly on the fact that Matthew and Brian were able to wear the Foxworthy t-shirt to school because of the Third Circuit's judgment ordering the district court to issue a preliminary injunction. *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 2006 WL 1675066, *6 (D.N.J. June 14, 2006).

In light of the arguments put forward by petitioners and their amici in this case, several points regarding the *Sypniewski* case deserve emphasis. First, the primary relief obtained was the ability of Matthew and Brian to wear the T-shirt to school without fear of punishment for racial harassment or insensitivity. The only other relief obtained was wording changes in the Dress Code and the Racial Harassment Policy. Second, although the district court did issue a "permanent injunction" with respect to those wording changes, it could easily have been otherwise. By the time the district court decided plaintiffs' motion for partial summary judgment, Matthew already had graduated and Brian's graduation was just a few months away. Had the district court delayed much longer, Brian's right to any permanent relief at all would have been moot as well. Alternatively, since defendants did not oppose plaintiffs' wording changes, they could have made the changes them-

selves and argued that an injunction was unnecessary. Third, the wording changes alone may not have been sufficient to justify a grant of fees under any circumstances. *Texas State Teachers v. Garland Ind. School Dist.*, 489 U.S. 782, 792 (1989) (although district court had concluded that prior approval requirement for nonschool hour meeting was unconstitutionally vague, "this alone would not have rendered them 'prevailing parties' within the meaning of § 1988"); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). Fourth, the preliminary injunction precluding defendants from applying the Racial Harassment Policy to the Foxworthy t-shirt was never made permanent. Despite that, Matthew received the benefits of the preliminary injunction for nearly two academic years, and Brian received its benefit for nearly three academic years. No permanent injunction could have done better for them.

SUMMARY OF ARGUMENT

This Court granted the petition for a writ of certiorari to answer the following question: Were plaintiffs here prevailing parties? Petitioners and their amici want to answer an entirely separate question: Do plaintiffs here deserve attorneys' fees? Petitioners' Brief ("Pet. Br.") at 40 ("There is no reason to shift fees in this case"); Brief of the United States as Amicus Curiae ("U.S. Br.") at 8 ("Fundamental fairness precludes imposing fee liability on a fully vindicated defendant"); *id.* ("Congress [did not] intend[] to saddle fully vindicated defendants . . . with attorney's fees . . . ."); *id.* at 19 (preliminary injunction proceedings do not permit the kind of consideration "needed to justify saddling the defendant with responsibility for attorney's fees"); Brief of National League of Cities, *et al.* ("NLC Br.") at 24 (Section 1988 "is not properly construed to award attorney's fees to plaintiffs who lose on the merits").

As this Court's precedents demonstrate, these are simply not the same questions. *E.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) ("In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all").

In answering the question of who is a "prevailing party," petitioners and their amici argue that a fairly clear line needs to be established. We agree. But when the line to be drawn is only a *necessary* condition to entitle a plaintiff to attorneys' fees, and not a sufficient one, common sense suggests that it should be set at a fairly low threshold, as in *Farrar*. When so done, courts are easily able to adjust the amount of fees to which a prevailing plaintiff is entitled to take into account things like the permanence of the relief obtained or whether any "final" resolution of the merits was achieved. In contrast, the threshold set by petitioners and their amici is so high that it would preclude fees in cases where any reasonable observer would conclude that plaintiffs had both prevailed and obtained a judgment on the merits. *E.g.*, U.S. Br. at 20 n.11 (plaintiff that obtains a preliminary injunction followed by defendants' capitulation would not be a "prevailing party").

To obscure this problem, petitioners and their amici try to paint preliminary injunctions with a broad brush. Some of their observations may be true some of the time; but they are not always true, and there lies the rub. It may be true on *some* occasions that a preliminary injunction motion is heard on very short notice; but sometimes (as in *Sypniewski*) the preliminary injunction is not issued until appeal and after extensive briefing and careful analysis by the Court of Appeals. It is also no doubt sometimes true that a lower court does not make a very thorough analysis of the merits on a motion for temporary relief; but sometimes

(as in *Sypniewski*) courts engage in extensive and long analyses of the likelihood of success on the merits and the preliminary injunction determination depends entirely on that analysis. *Sypniewski*, 307 F.3d at 252; *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704, 709 (E.D. Va. 2000) (renown author entitled to a preliminary injunction, *inter alia*, requiring lesser-known author to have booksellers remove stickers that he had affixed to his books and to amend his personal website; standard for mandatory preliminary injunctions requires a showing of a "clear and convincing probability of success" such that "if there is doubt as to the probability of plaintiff's ultimate success, a request for preliminary mandatory relief must be denied" and well-known author "has met that burden by showing that she is virtually certain of success on the merits") (internal quotation marks and citations omitted). It also may be true that some preliminary injunctions last only a very short period of time; but others (as in *Sypniewski*) can last for years, as long as some so-called "permanent" injunctions last.

Petitioners' approach makes no sense at all. They suggest that if the plaintiffs in *Sypniewski* had entered into a consent order giving them the right to wear the Foxworthy t-shirt for one academic year, they would have been "prevailing parties"; but that having received a preliminary injunction that gave them the right to wear the same t-shirt for *three* academic years, they were not. They argue that a $1 nominal damages award is a "material" change in the legal relationship between the parties; but that a preliminary injunction that lasts for years is not.

Just like the nominal damages award in *Farrar*, considerations like the length of the injunction or the degree to which the merits were analyzed can be assessed by district courts to determine the amount of fees that are "reasonable."

But to lay down a bright line rule that would preclude any fees at all in cases where plaintiffs have received long-lasting relief based upon a thorough consideration of the merits -- indeed, where they have prevailed in every meaningful sense of the word -- would violate both Congress's understanding of the purpose of Section 1988 and fundamental notions of fairness.[2]

ARGUMENT

I. This Court's Precedents Demonstrate That Judicial Relief That Alters The Parties' Legal Relationship Is Sufficient To Attain Prevailing Party Status.

Petitioners and their amici take snippets of language from this Court's earlier cases in their effort to demonstrate that an order granting temporary relief is inadequate to form the basis for "prevailing party" status. They fail to take into account the context in which this language was used, and thus ignore the fact that most of their arguments based upon precedent cannot explain one or more of this Court's previous decisions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) ("we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as thought they were the United States Code").

1. "Nothing in the language of § 1988 conditions

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[2] In this regard, we agree with petitioners that a line between various kinds of temporary relief -- *e.g.*, "status-quo" injunctions v. "merits-based" injunctions -- is difficult to draw and, more importantly, entirely unnecessary as a prerequisite to finding that a plaintiff is a "prevailing party." Pet. Br. at 24-25. The district courts can take these factors into account in determining the amount of a reasonable fee.

the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). In *Maher*, this Court specifically upheld the award of fees to a plaintiff who had obtained results by entry of a consent decree, despite the fact that the consent decree "[a]s is customary . . . did not purport to adjudicate respondent's statutory or constitutional claims." *Id.* at 126 n.8. As this Court explained in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001), such "court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (*quoting Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 488 U.S. at 792-93).

Thus, the various arguments by petitioners and their amici that a plaintiff is not a prevailing party unless (s)he has prevailed on the "merits" simply fails to take *Maher* into account. *E.g.*, Pet. Br. at 15; U.S. Br. at 8-10. Cases upon which they rely, like *Hewitt v. Helms*, 482 U.S. 755 (1987), involved situations where the plaintiffs achieved no alteration at all of the legal relationship between themselves and defendants, much less a "material" one.[3]

In fact, this Court's precedents have emphasized that the change in a legal relationship necessary to cross the "prevailing party" threshold is a low one:

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[3] So, too, both "common usage" and the legal definition of the word "prevailing" are inadequate to cover this Court's past precedents. *Cf.* NLC Br. at 11-12. Common usage would suggest that the plaintiff in *Buckhannon* did, and Mr. Farrar did not, "prevail." The technical legal definition of "prevailing party" would not usually include a plaintiff who enters into a consent decree in which the defendants do not admit wrongdoing or liability.

> A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA 1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.'

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). *See also Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. at 791-92. The only question in this case, then, is whether the plaintiffs' ability to engage in the peace protest they sought was a "significant issue" that achieved some of the benefit they sought in bringing the suit. Surely, it was.

Similarly, this Court has emphasized that a "material alteration of the relationship between the parties occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against the defendant." *Farrar v. Hobby*, 506 U.S. at 113. There can be no dispute that an order granting a motion for a preliminary injunction is a "judgment." Rule 54(a), Fed. R. Civ. P. ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies"); 28 U.S.C. § 1292(a)(1) (courts of appeals have jurisdiction over appeals from orders granting injunctions). *See also, e.g., Financial Services Corp. of Midwest v. Weindruch*, 764 F.2d 197, 198 (7th Cir. 1985). A plaintiff that receives the benefits of a preliminary injunction can "enforce" that judgment to ensure compliance by the parties subject to it.

2. Petitioners and amici have two responses to these precedents. First, they suggest that there is a two-category standard for "prevailing party" status, the two more-or-less unrelated categories being those who have achieved a final judgment on the merits and those who have achieved a change in the legal relationship between the parties through a consent judgment. *E.g.*, Pet. Br. at 16; U.S. Br. at 11. Second, they suggest that the phrase "material alteration" must mean a "permanent" or "final" alteration in the parties' legal relationship. *E.g.*, Pet. Br. at 13; U.S. Br. at 21.

Petitioners and their amici proffer the suggestion that there are only two categories of plaintiffs who are prevailing parties so that they can distinguish a plaintiff who has procured a preliminary injunction from each. Accordingly, they insist that those plaintiffs who have not attained a court-ordered consent decree are not prevailing parties unless they were ultimately victorious in the lawsuit. But this Court has not created such rigid categories in its fee jurisprudence. Rather, court-ordered consent decrees and judgments on the merits entitle plaintiffs to "prevailing party" status because they meet the "generous formulation" that grants such status to all who have attained a material alteration in their legal relationship with the defendants. In *Buckhannon*, 532 U.S. at 605, this Court concluded that "the 'catalyst theory' falls on the other side of the line" from the judgment on the merits and the consent decree. That is, there is just *one* line (or standard), and not two, that distinguish judicial orders sufficient to justify "prevailing party" status, and those that do not. And *that* line obviously does not require a full-fledged assessment of the merits of the case for the simple reason that court-ordered consent decrees do not require much assessment of the merits at all.

Thus, petitioners and their amici must fall back on their second argument, *viz.*, that only a "final and enduring" (U.S. Br. at 24 n.14) alteration in the legal relationship is a material one. *Id.* at 7 ("enduring, material change"); NLC Br. at 8 ("success that is lasting"). But this argument creates a false dichotomy between the "permanent" relief of a consent-decree and the "temporary" relief of a preliminary injunction.

Nothing is forever, not even "permanent" injunctions (be they imposed with the consent of the parties or otherwise). For example, in *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991), this Court emphasized that school desegregation decrees "are not intended to operate in perpetuity," and a decree entered into with the consent of the parties would be no less subject to modification when circumstances warranted.

More importantly, consent decrees are frequently time-limited by their own terms. For example, in *EEOC v. Local 40, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 76 F.3d 76 (2d Cir. 1996), two intervenors sought in 1993 to have a union held in contempt for violating a 1980 consent decree. The consent decree emanated from a suit brought by the EEOC alleging discrimination against minorities and had sought to ensure that the union would take affirmative steps to ensure fairness and non-discrimination in hiring and referrals. It had a three-year expiration provision, but another provision stated that the union would be "permanently enjoined" from discriminating against minorities. *Id.* at 80. The Second Circuit held that the agreement had expired and that the district court had no jurisdiction to enforce it. It failed to perceive any ambiguity between the provision "permanently enjoining" the union and the three-year termination provision because "[j]udges often

use the word 'permanent' to distinguish post-litigation or post-settlement injunctions such as this one from the preliminary or temporary injunctions sometimes issued before full resolution of the merits." *Id.*

This Court has never held, nor would it make sense to hold, that only consent decrees that last more than a particular period of time are sufficient to bestow "prevailing plaintiff" status. On the other hand, as shown in the *Sypniewski* case, some preliminary injunctions can be quite long lasting. Thus, in many instances, the difference between consent decrees and preliminary injunctions is really much more a difference in degree than kind. It is most likely that, on the whole, consent decrees have a longer duration, although some are probably shorter in duration than many preliminary injunctions. On the other hand, preliminary injunctions, on the whole, probably involve a more serious judicial assessment of the underlying merits of plaintiffs' case than judicial approval of consent decrees. To suggest that one group (consent decrees) universally involves a "material" change in legal relationships while the other (preliminary injunctions) never does just ignores reality.

II. Petitioners' Standard Would Lead To Harsh Results

As if to emphasize the harsh results their theories would entail, both petitioners and their amici urge that plaintiffs who both receive the benefits of a judicially-sanctioned preliminary injunction and who obtain completely satisfactory results at the end of the litigation should nonetheless be denied prevailing party status. Thus, petitioners argue that those plaintiffs who obtain a preliminary injunction that becomes moot with the passage of time should be denied prevailing party status. Pet. Br. at 32-35. The United States argues that those plaintiffs who obtain a

preliminary injunction, and where the defendants then simply read the writing on the wall and give up, are not prevailing parties. U.S. Br. at 20 n.11.

1. Petitioners' argument seems to be based on several misunderstandings. First, it is entirely unclear what petitioners mean when they refer to the "mootness of an interim order" (Pet. Br. at 34) like a preliminary injunction order. *All* preliminary injunctions become "moot" at some point; that is the nature of *temporary* relief. A preliminary injunction "pending trial" or "pending appeal" will presumably be moot (and unappealable) after final judgment or the appeal. As such, this argument does not seem to be anything more than a reiteration that all preliminary injunctions are inadequate to justify prevailing party status.[4]

Petitioners also misunderstand this Court's precedents on vacatur. It is true that the extraordinary remedy of vacatur is sometimes appropriate when a final judgment becomes moot pending appeal -- albeit subject to the equitable exercise of the appellate court. *See U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) ("It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur"). But petitioners cite no case where this Court has held that a district court should vacate its own preliminary injunction if it becomes moot over time (which, of course, it always will). Indeed, petitioners' argument seems to be

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[4] Although, again, it is quite unclear, petitioners may be referring to cases where preliminary injunctions are issued and the underlying request for similar *permanent* relief becomes moot through the passage of time. Alternatively, they may be referring to preliminary injunctions that themselves become moot pending appeal of the order itself.

internally incoherent. Vacatur is designed to clear the path for future litigation where the losing party has been deprived of its right to appeal through no fault of its own. *Id.* at 22-23. But if, as petitioners argue, "the general rule is that a preliminary injunction lacks preclusive consequences," and "the doctrines of res judicata, collateral estoppel, and law of the case do not apply," Pet. Br. at 21, vacating an order granting a preliminary injunction serves no purpose at all, much less a purpose that justifies the "extraordinary remedy of vacatur." *Bonner Mall Partnership*, 513 U.S. at 26.

Thus, while vacated judgments cannot serve as a basis for attorneys' fees, petitioners are wrong to suggest that *all* preliminary injunctions should be vacated simply because of the passage of time. In *Sypniewski*, the district court entered a preliminary injunction after it was ordered to do so by the Third Circuit. That is, the defendants there already had had an opportunity to present their arguments to an appellate court (and subsequently filed a petition for writ of certiorari with this Court). The district court did not "vacate" its previous preliminary injunction order, and, it is hard to understand how it would have had the authority to do so given that its source was a superior court.

Ultimately, petitioners' argument is that wholly successful plaintiffs, who received the benefits of a judicially-ordered preliminary injunction for as long as they needed one, are not "prevailing parties." They further assert -- without explanation and in defiance of basic common sense -- that their position will not discourage plaintiffs with meritorious cases, but who seek relief over a short time horizon, from bringing their suits. Pet. Br. at 38. If the "common understanding" of "prevailing party" is at all relevant to this determination, it is surely difficult to justify

that outcome.[5]

2. Even harder to comprehend is the United States's argument that those who obtain a judicially-sanctioned preliminary injunction, and whose defendants then surrender so convincingly that a court concludes that no permanent injunction is needed, are *still* not "prevailing parties." U.S. Br. at 20 n.11. (Petitioners themselves seem less certain on this point. Pet. Br. at 38 n.21 (might discourage meritorious suits).) Again, this is hardly consistent with common sense, much less this Court's "generous

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[5] For this reason, respondent Simon prevailed in this case. The United States asserts that it is "doubtful" that respondent Simon has standing. U.S. Br. at 3 n.3. As a broad proposition, this is wrong. Standing is determined at the outset of the case, and the United States offers no reason why Simon did not have standing to challenge Florida's regulations prior to the peace protest on February 14, 2003. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 (2000) ("we have an obligation to assure ourselves that [plaintiff] had Article III standing *at the outset of the litigation*") (emphasis added); *Worth v. Jackson*, 451 F.3d 854, 859-60 (D.C. Cir. 2006) (although challenge to employment policy was moot, because the challenged policy had lapsed, plaintiff nonetheless had standing because challenged policy "was in place when [plaintiff] filed suit and '[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.'") (*quoting Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). Simon also surely has standing to seek attorneys' fees and to defend the award of such fees on appeal. *Cf. Bonner Mall Partnership*, 513 U.S. at 390 (court is not powerless to award costs just because case became moot on appeal).

The United States has "confused mootness with standing." *Friends of the Earth*, 528 U.S. at 189. What it apparently means is that Simon's request for a permanent injunction to Florida's regulations became *moot* after February 14, 2003. That may well be true, but it only demonstrates that Simon obtained all the relief he possibly could have obtained from this litigation.

formulation" of the "prevailing party" standard. *Hensley v. Eckerhart*, 461 U.S. at 433.

Perhaps worst of all, the standard suggested by petitioners and their amici would give attorneys incentives to act contrary to the interests of their clients.[6] When a preliminary injunction is issued, and an attorneys' clients need it for a limited period of time, it is not in the clients' best interests to rush the case to trial.[7] Similarly, when clients have obtained a preliminary injunction, with perhaps a strong judicial hint that they will be successful on appeal, it is usually not in the clients' best interest to resist the defendants' complete surrender, if judged to be in good faith, by insisting upon a permanent injunction to which the defendants may be reluctant to assent.

Yet this is the result that petitioners and their amici

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[6] It is true, of course, that the right to statutory fees belongs to the client, and not the attorney. *Evans v. Jeff D.*, 475 U.S. 717, 730-31 (1986). But, as this Court has noted, most attorneys take civil rights cases subject to fee-shifting statutes with the express understanding that the client will pay the attorney any fees that he receives pursuant to such a statute. *Cf. Venegas v. Mitchell*, 495 U.S. 82, 86 (1990) ("It is likely that in many, if not most, cases a lawyer will undertake a civil rights case on the express or implied promise of the plaintiff to pay the lawyer the statutory award, *i.e.*, a reasonable fee, if the case is won."). CIR's agreements with its clients usually incorporate such a provision.

[7] Nor is it always possible to do so. The United States repeatedly asserts that a plaintiff seeking a preliminary injunction who wishes to have a "full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2)." U.S. Br. at 7. *Id.* at 19-20. The operative term, of course, is "seek"; there is no guarantee that a defendant will consent to, or a court will order, such relief. And, again, it may not be in the best interests of plaintiffs who believe that their case will become stronger through discovery to even make the request.

insist upon: giving attorneys incentives to work against their clients' best interests. There are a sufficient number of incentives for irresponsible attorney behavior without the law on "prevailing party" status adding to them.

CONCLUSION

Respondents are "prevailing parties." Petitioners failed to seek a review of any other issue related to the award of attorneys' fees, and, accordingly, the judgment of the court below should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T.A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, PROFESSOR CATHERINE R. ALBISTON AND PROFESSOR LAURA BETH NIELSEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Given new empirical evidence that a narrow construction of the term "prevailing party" has undermined civil rights enforcement by both conservative and liberal public interest organizations, should the Court further restrict access to the judicial process by extending *Buckhannon* to preliminary injunctive relief?

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INTERESTS OF *AMICI CURIAE*[1]

This case concerns whether *Buckhannon* should be extended to civil rights actions that involve preliminary injunctive relief. Resolution of this action is likely to affect the ability of indigent civil rights plaintiffs to find representation and vindicate their rights in court. The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity ("Warren Institute"), as *amici curiae*, seeks to bring to the Court's attention new empirical research regarding *Buckhannon*'s effect on civil rights enforcement by private parties and on access to the judicial process for indigent victims of civil rights violations.

The Warren Institute is a multidisciplinary, collaborative venture to produce research, research-based legal and policy prescriptions, and curricular innovation on issues of racial and ethnic justice throughout the nation. The Institute's mission is to engage the most difficult topics related to civil rights, race, and ethnicity, providing valuable intellectual capital to public and private sector leaders, the media, and the general public while advancing scholarly understanding. Located at the Boalt Hall School of Law at the University of California, Berkeley, the Institute seeks to connect the world of scholarship with the world of civil rights litigation and policy debate so that each informs the other, while preserving the independence, quality, and integrity of the research enterprise. One

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part. No person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of the brief of *amici curiae*, and their letters of consent accompany this brief.

of the principal ways that the Warren Institute strives to add value to civil rights law and policy is by bringing timely and relevant empirical work to bear on complex legal issues. The instant brief exemplifies this approach.

Catherine R. Albiston is a professor of law at the University of California, Berkeley, where she specializes in the empirical study of law and social change. She is the primary author of the research presented in this brief.

Laura Beth Nielsen is a professor of sociology and law at Northwestern University and Research Fellow at the American Bar Foundation, where she specializes in empirical research about employment law and the legal profession. She is a coauthor of the research discussed in this brief.

SUMMARY OF ARGUMENT

This *amicus* brief reports new empirical research that indicates that the Court's narrow construction of the term "prevailing party" has undermined civil rights enforcement actions, particularly in cases that seek equitable relief. These data also indicate that limiting fee recovery has discouraged attorneys from representing indigent victims of civil rights violations, jeopardizing their access to the courts. Adopting a *per se* rule that preliminary injunctions can never confer prevailing party status would further undermine civil rights enforcement, and such a rule is not required by *Buckhannon*. Instead, this Court should recognize that preliminary relief can confer prevailing party status in appropriate circumstances.

First, *Buckhannon* does not require a *per se* rule that preliminary injunctions can never confer prevailing party status. *Buckhannon* held only that "enforceable judgments on the merits and court-ordered consent decrees" were sufficient to confer prevailing party status, and that the catalyst theory "falls on the other side of the line from these examples." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05 (2001). It remains an open question where that line lies, and preliminary injunctions are easily distinguishable from the catalyst theory because they require consideration of the merits, carry the judicial *imprimatur* of a court order, and are enforceable judgments from which an appeal may lie. 28 U.S.C. § 1292(a)(1); Fed. R. Civ. P. 54(a). Petitioners argue for an overinclusive *per se* rule that is not required by *Buckhannon* and that would undermine civil rights enforcement in a broad array of cases far beyond the facts of this case.

Second, new empirical research shows that *Buckhannon*'s narrow construction of prevailing party has substantially undermined civil rights enforcement, and that enforcement actions that seek equitable relief have been especially hard hit. For example, organizations that bring enforcement actions seeking equitable relief from state entities were seven times more likely than others to report negative effects from *Buckhannon*. Lawyers also report that defendants are capitulating before judgment in meritorious claims to avoid a final judgment and a fee award, and that the uncertainty of fee recovery has made lawyers unwilling to represent indigent plaintiffs in civil rights cases. Conservative and liberal organizations have been equally affected; there were no statistically significant differences in their reports of negative fallout from

Buckhannon. These data strongly suggest that a ruling that preliminary injunctive relief can confer prevailing party status in appropriate circumstances would mitigate *Buckhannon*'s negative effects on civil rights enforcement.

Third, a *per se* rule that preliminary injunctive relief can never confer prevailing party status would clog the courts with repetitive litigation and further undermine civil rights enforcement. Because obtaining preliminary injunctive relief involves consideration of the merits, a preliminary injunction signals the likely outcome of the litigation and will prompt defendants to capitulate before trial to avoid a final judgment and the accompanying fee award. Strategic capitulation not only deprives the plaintiff of fee recovery, it also defeats any final resolution of the case, producing repetitive, wasteful litigation. *Smyth v. Rivero* illustrates this problem, as it caps almost a decade of repetitive litigation with no final resolution of the underlying civil rights claim. The *per se* rule proposed by petitioners would be an open invitation for serial litigation like this that turns civil rights litigation into a perverse game of cat and mouse, wasting judicial resources and discouraging attorneys from representing indigent victims of civil rights violations.

Fourth, many civil rights actions involve time-sensitive relief that supports core elements of democratic society, such as preserving access to the franchise, protecting freedom of expression, and ensuring transparency of government through freedom of information. Often a preliminary injunction is the *only* form of success in these cases because once the election is over, the protest occurs, or the government produces the requested documents, these cases become moot through the operation of the preliminary injunction itself. Eviscerating fee recovery for

such important claims would subvert the important democratic values behind these laws and make plaintiffs in these cases victims of their own success.

Finally, a *per se* rule would adversely affect several circumstances in which prevailing party status is appropriate. The atypical facts of this case do not offer a suitable vehicle for evaluating these important policy questions, and consequently the Court may wish to consider dismissing certiorari as improvidently granted. At the very least, however, this Court should reject an overinclusive *per se* rule and leave these important questions for later resolution with an appropriate factual predicate.

ARGUMENT

I. An Overinclusive *Per Se* Rule that Preliminary Injunctions Never Confer Prevailing Party Status is not Required by *Buckhannon*.

Buckhannon does not require a *per se* rule that preliminary injunctions never confer prevailing party status. *Buckhannon* held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fee." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (internal citations omitted). The Court reasoned that the catalyst theory "falls on the other side of the line from these examples" because "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605. The Court did not

hold that judgments on the merits and court-ordered consent decrees were the *only* forms of relief that confer the necessary judicial *imprimatur* to confer prevailing party status, but instead left open where the line lies. *Buckhannon* also did not address preliminary injunctions, which are easily distinguishable from the catalyst theory because they require consideration of the merits, carry the judicial *imprimatur* of a court order, and are enforceable judgments from which an appeal may lie. 28 U.S.C. § 1292(a)(1); Fed. R. Civ. P. 54(a) (a judgment includes "any order from which an appeal lies").

At issue in this case is whether, and under what circumstances, preliminary injunctive relief is sufficient to confer prevailing party status. As the empirical evidence discussed below shows, *Buckhannon*'s narrow construction of the term "prevailing party" has made lawyers who represent civil rights plaintiffs nervous about their ability to continue to do so and remain financially solvent. These data also indicate that the uncertainty over fees introduced by *Buckhannon* has been particularly problematic for civil rights plaintiffs who seek equitable relief. Petitioners argue for an overinclusive *per se* rule that would only exacerbate these problems and further undermine civil rights enforcement in a broad array of cases far beyond the facts of this case. With a narrower ruling, the Court can mitigate *Buckhannon*'s negative effects and avoid discouraging the civil rights enforcement actions Congress intended to promote by enacting Section 1988.

II. New Empirical Research Indicates that Restricting Fee Recovery has Undermined Civil Rights Enforcement by Both Conservative and Liberal Public Interest Organizations, Especially for Actions that Seek Equitable Relief.

When the Court decided *Buckhannon,* it considered whether restricting fee recovery would limit access to the courts and discourage plaintiffs with meritorious cases from filing suit, but concluded that these concerns were "unsupported by any empirical evidence." 532 U.S. at 608. The purpose of this *amicus* brief is to bring to the Court's attention new empirical research that indicates that these restrictions have discouraged enforcement actions and have made it more difficult for indigent plaintiffs to find representation. There were no differences between conservative and liberal public interest organizations on this point; both were equally, negatively affected. This research also suggests that enforcement actions that seek equitable remedies, such as injunctive relief against government actors, are the most likely to be undermined by a narrow interpretation of prevailing party.

The findings discussed below come from data from a national, representative survey of 221 public interest law organizations examining several facets of public interest practice in the United States. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. (forthcoming June 2007), *available at* http://ssrn.com/abstract=937114. Conducted in 2004, this survey asked, *inter alia*, whether *Buckhannon* had affected (positively or negatively) each respondent's ability to pursue its goals. *Id.* at 34. To obtain more detailed data about *Buckhannon*'s effects, the survey

also included a qualitative, open-ended question about how *Buckhannon* affected the respondent's practice. *Id.* at 39. The survey included additional questions about organizational size, budgetary reliance on attorney's fees, practice area subject matter, investment in impact litigation, political orientation of the organization, and the effects of recent sovereign immunity decisions on the organization.[2] *Id.* at 35-36.

The researchers conducted a multivariate analysis of the quantitative data to determine which factors relate to whether an organization was negatively affected by *Buckhannon*, controlling for organizational size and the organization's budgetary reliance on attorney's fees. In conducting this analysis, the study investigated a concern raised in *Buckhannon* that defendants would capitulate before judgment to moot the case and avoid a fee award, a maneuver the researchers called "strategic capitulation." *See Buckhannon*, 532 U.S. at 608. With this concern in mind, the researchers anticipated that certain factors would be related to negative fallout from *Buckhannon*. First, they expected that organizations that invest significant efforts into impact litigation would become more vulnerable to fee loss because impact litigation typically involves claims for broad injunctive relief, such as a change in policy, rather than individual damages claims that insulate against strategic capitulation. Second,

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[2] The survey was administered by a professional survey center to a random sample of public interest organizations in the United States, and had a very strong 82 percent response rate. Albiston & Nielsen, *supra*, at 32. For more detail on the study's methodology, *see id.* at 29-32; Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. Rev. 1591, 1601-05 (2006).

because sovereign immunity generally prevents organizations that litigate against state entities from bringing damages claims to fend off strategic capitulation, the researchers expected that organizations that were affected by the Court's recent sovereign immunity decisions would also be more likely to be negatively affected by *Buckhannon*. Finally, the researchers anticipated that enforcement actions in the civil rights, environmental, and poverty areas, would be more likely than others to involve solely equitable relief, and therefore become more vulnerable to strategic capitulation. Accordingly, they expected that organizations that practice in those subject areas would be more likely to be negatively affected by *Buckhannon* than those that do not. *See* Albiston & Nielsen, *supra*, at 32-34.

The results of these analyses are reported in detail in the forthcoming article, but can be briefly summarized here. After controlling for certain characteristics, such as organizational size and budgetary reliance on attorney's fees, the factors outlined above – investment in impact litigation, negative effects from the sovereign immunity decisions, and practicing in the areas of civil rights, environmental, or poverty law – all were positively, significantly associated with negative fallout from *Buckhannon*.[3] *Id.* at 36-39 & Table 3. In fact, organizations that were negatively affected by the sovereign immunity decisions were seven times more likely than others to report negative effects from *Buckhannon,* and those that practice in

[3] These effects were robust across different specifications of the statistical model, and significant at the $p<.01$, or, in the case of the sovereign immunity variable, $p<.001$ level. Albiston & Nielsen, *supra*, Table 3.

the areas of civil rights, poverty, and environmental law were more than seventeen times more likely than others to report these negative effects. *Id.*, Table 3.

These quantitative data indicate that plaintiffs who seek solely injunctive relief, such as claims against state actors seeking a change in policy, are particularly vulnerable to fee loss after *Buckhannon*, a result consistent with strategic capitulation. These equitable actions also seek the forms of relief that are most likely to have broad effects in the public interest. This finding strongly suggests that clarifying that preliminary relief can confer prevailing party status, at least when the defendant's actions deprive the plaintiff of the opportunity to obtain final adjudication of the merits, would help to mitigate *Buckhannon*'s negative effects on civil rights enforcement.

In addition to these quantitative data, the researchers collected qualitative data by asking how *Buckhannon* affected these organizations. The organizations' responses were illuminating. First, strategic capitulation is a substantial concern, as this comment from one respondent illustrates:

> [*Buckhannon*] allows the federal defendants, who we frequently litigate against, to make strategic decisions to moot out cases before a final judgment has been entered and as a result we are often unable to recover attorney's fees in cases that we've made substantial investments in. *Id.* at 39.

Second, respondents report that they are less likely to take on enforcement actions. One respondent stated the calculus succinctly: "*Buckhannon* makes us less likely to do cases because we can't get attorney's fees." *Id.* at 41.

Third, respondents reported that it is more difficult to find attorneys to whom they can refer promising claims, as this respondent describes:

> [N]ow with that hurdle it just means that it's harder for us to refer cases to attorneys who may in the past have taken attorneys cases that they thought may get attorney fees. But now says, "Hey, I got one more hurdle to take. I'm not, I'm not willing to invest the time and energy in it." *Id.*

These qualitative responses indicate that attorneys are turning away plaintiffs in enforcement actions, much like the situation Congress confronted when it enacted Section 1988. Congress enacted Section 1988 in response to the Court's ruling in *Alyeska* that federal courts lacked the power to award fees to prevailing parties absent specific statutory authorization. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). *Alyeska* had a "devastating" impact on civil rights enforcement because after *Alyeska* limited fee recovery, private attorneys began to refuse to take on civil rights cases. H.R. Rep. No. 94-1558, at 3 (1976). Congress found that "a vast majority" of civil rights claimants could not afford legal counsel and were suffering "very severe hardships" as a result. *Id.* at 1-2. Much like the situation after *Alyeska*, this research indicates that the Court's narrow construction of prevailing party has put access to the judicial process for indigent plaintiffs in serious jeopardy. A *per se* rule that preliminary injunctive relief could never support a fee award would further erode the ability of indigent civil rights claimants to find representation, thus undermining the primary goal behind Section 1988.

One final finding underscores how fee shifting statutes support enforcement actions across the political spectrum. Among public interest organizations in this study, there were no significant differences between conservative and liberal organizations in their reports that *Buckhannon* has hindered their work; both groups were equally affected. Albiston & Nielsen, *supra,* at 43. This finding is not surprising given that conservative public interest organizations have enjoyed considerable success in recent civil rights cases, including actions seeking equal access to public facilities for religious groups and challenging affirmative action programs. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Center for Individual Rights); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Mountain States Legal Foundation); *Lamb's Chapel v. Ctr. Moriches Union Free Sch.*, 508 U.S. 384 (1993) (American Center for Law and Justice). Enforcement actions such as these, which typically seek equitable relief, are now structurally vulnerable to strategic capitulation.[4]

Taken together, these findings suggest that the effects of limits on fee recovery are not about conflict between conservative and liberal political factions, but instead

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[4] Although the data reported here relate only to public interest organizations, this does not undermine these findings; quite the contrary. The dynamics suggested by these data also apply to privately-represented litigants who bring solely equitable claims. The implications of limiting fee recovery may be far worse for these plaintiffs because unlike public interest organizations that sometimes receive foundation grants or charitable contributions, private lawyers typically rely exclusively on attorney's fees to support their practice. Of course, public interest organizations often litigate landmark cases that affect many people, so even if these effects were limited to these organizations, the impact would still be substantial.

represent a shift away from private enforcement of rights and toward government power, both to resist civil rights mandates and to control the enforcement, and ultimately the meaning, of those rights. Such a shift would result in very different incentives for bringing enforcement actions. For example, relying heavily on government enforcement would leave enforcement decisions vulnerable to the political whims of changing administrations and to the budgetary constraints of underfunded administrative agencies. Also, the sheer magnitude of the task is daunting. Private parties bring more than ninety percent of civil rights enforcement actions. *See* Albiston & Nielsen, *supra*, at 2 & n.6. If restricting access to fee recovery reduces private enforcement efforts, as the data reported here suggest that it will, it would require a massive infusion of government resources to replace the decentralized private attorney general system. Indeed, when Congress enacted Section 1988, it recognized that "fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." S. Rep. No. 94-1011, at 4 (1976). Also, in some instances, the interests of federal and state actors may align against enforcing particular rights, even if such an enforcement action would be in the public interest. For these reasons, allowing injunctive relief to confer prevailing party status in appropriate circumstances is essential to preserve vigorous private enforcement of rights.

These dynamics are important because Congress intended Section 1988 to address both underenforcement by governmental entities and the imbalance of power between civil rights plaintiffs and government defendants. Congress was especially concerned about undermining

private enforcement actions precisely because civil rights enforcement depends so heavily on private suits due to the limited authority and resources of government enforcement agencies. S. Rep. No. 94-1011, at 3; H.R. Rep. No. 94-1558, at 1. When government entities are defendants, Congress intended Section 1988 to level the playing field between government officials and less powerful civil rights plaintiffs, noting that "governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves." H.R. Rep. No. 94-1558, at 7. Far from disapproving fee awards from tax payer funds, Congress found that "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." *Id.* A *per se* rule would undermine these important goals, thwarting the congressional purpose behind Section 1988.

III. A Rule that Preliminary Injunctive Relief Can Never Confer Prevailing Party Status Would Clog the Courts with Repetitive Litigation and Undermine Civil Rights Enforcement.

Petitioners' argument for a *per se* rule raises a significant policy question: the extent to which defendants can defeat appropriate fee awards through strategic capitulation. Here, the practical realities with regard to fee shifting and preliminary relief illustrate why attorneys will hesitate to take on civil rights enforcement claims if the Court extends *Buckhannon* to preliminary injunctive relief. The concern is that defendants who are faced with likely adverse judgments will defeat fee petitions in meritorious claims by providing the requested relief just

before judgment is entered, thus mooting the case. If this strategy becomes common, attorneys will be reluctant to invest time and resources representing indigent civil rights plaintiffs.

As this Court recognized in *Buckhannon*, strategic capitulation is a problem in claims for equitable relief. *See* 532 U.S. at 608. There is reason to believe that equitable claims, particularly in civil rights claims against states, may be becoming more common. After this Court's recent decisions regarding state sovereign immunity, many civil rights actions against states may *only* seek prospective relief. *See, e.g., Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 80 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Plaintiffs in actions such as these cannot choose to include a damages claim to avoid strategic capitulation; in fact, they are prevented from doing so.

If this Court extends *Buckhannon* to preliminary relief, preliminary injunctions will invite strategic capitulation in civil rights actions that seek equitable relief. Because obtaining preliminary relief involves consideration of the merits, a preliminary injunction is an important signal about the likely outcome of litigation. A plaintiff who obtains a preliminary injunction becomes especially vulnerable to strategic capitulation because the injunction will prompt wise defendants to change course before trial to avoid a final judgment and the accompanying fee award. Note that the aggregate effect on the universe of civil rights plaintiffs is the problem here. Although in the short run, an individual plaintiff might obtain relief from strategic capitulation, in the long run, attorneys will hesitate to take on important civil rights cases that require time-sensitive relief if they know that obtaining a needed preliminary injunction risks strategic

capitulation. The problem is compounded if the claim requires a significant investment of time and resources, as many institutional reform actions do. This dynamic undermines the entire Section 1988 framework, which is intended to address both individual and collective interests. Indeed, it is concern over this potential negative effect on access to the judicial process that has led some states to reject the *Buckhannon* approach in their jurisdictions. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148-49 (Cal. 2004); *see also Teeters v. Div. of Youth & Family Serv.*, 904 A.2d 747, 753 (N.J. 2006).

Smyth v. Rivero, the lone circuit authority that holds that preliminary injunctions cannot confer prevailing party status, in fact illustrates the problem of strategic capitulation. *Smyth ex rel. Smyth v. Rivero,* 282 F.3d 268 (4th Cir. 2002). *Smyth* involved a challenge by AFDC recipients to a Virginia policy that required welfare applicants to identify the father of any child for whom they requested aid, or to provide the names of all persons who might be the father. *Id.* at 271. After finding that the state's decision to deny benefits to the plaintiffs under this policy contradicted federal regulations, the district court preliminarily enjoined enforcement of the policy, and the plaintiffs moved for summary judgment. *Id.* at 272. One day before the summary judgment hearing, the Virginia Poverty Law Center, which represented the indigent plaintiffs, agreed to continue the hearing on condition that the state would not seek repayment of benefits already paid to its clients. *Id.* at 273. The state then modified the policy to be prospective only so that it no longer applied to the plaintiffs. *Id.* The district court dismissed the claim as moot, but granted plaintiffs' motion for fees under Section 1988. *Id.* The Fourth

Circuit reversed, finding the preliminary injunction was not sufficient to support a fee award after *Buckhannon*. *Id.* at 284-85.

The history of this case illustrates the waste of resources involved when defendants engage in procedural maneuvering to avoid adjudication of the merits and a fee award. This was not the first time that the Virginia Poverty Law Center brought such an action against the state of Virginia and obtained a preliminary injunction against enforcing the policy, nor was it the first time the action was rendered moot by the defendant's unilateral conduct. *See Smyth v. Carter*, 168 F.R.D. 28, 32-33 (W.D. Va. 1996) (granting preliminary injunction against denying benefits based solely on recipients' inability to provide paternity information); *Smyth v. Carter*, 88 F.Supp. 2d 567, 571 (W.D. Va. 2000) (finding action moot after defendants amended the policy so that it no longer applied to plaintiffs). Still, despite repeated litigation over nearly a decade, the underlying policy remained in force without any adjudication on the merits because the defendant repeatedly changed its policy to moot the claim *with respect to these particular plaintiffs only.* By mooting the case in this way in *Smyth v. Rivero*, the state not only avoided substantially changing the policy, but also destroyed any possibility for the fee recovery that creates incentives for attorneys to represent indigent plaintiffs like these.

A *per se* rule denying fee awards for preliminary relief would be an open invitation for serial litigation such as this that turns civil rights litigation into a perverse game of cat and mouse, wasting judicial resources and discouraging attorneys from representing indigent plaintiffs with meritorious claims. Indeed, "satellite litigation" over fees

pales in comparison to the repetitive litigation that would result from strategic capitulation like that in *Smyth*. Of course, it is possible that denying fee recovery for preliminary relief will reduce litigation by discouraging disadvantaged victims of civil rights violations from bringing claims in the first place, but this is hardly what Congress intended by authorizing fees to prevailing parties in civil rights cases. For this reason, the more measured approach taken by other circuits, which recognize that preliminary relief can confer prevailing party status in appropriate circumstances, is more appropriate and more consistent with congressional intent behind Section 1988. *See, e.g., Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945-946 (D.C. Cir. 2005) (finding plaintiffs were prevailing parties entitled to fees when the defendant capitulated after plaintiffs obtained a preliminary injunction); *Watson v. County of Riverside*, 300 F.3d 1092, 1096-97 (9th Cir. 2002) (finding plaintiff was a prevailing party entitled to fees when the claim on which the plaintiff prevailed became moot by operation of the preliminary injunction).

IV. Denying Prevailing Party Status to Certain Civil Rights Plaintiffs who Obtain Time-Sensitive Relief Would Subvert Important Democratic Values.

Many civil rights actions involve time-sensitive relief that supports core elements of democratic society, such as preserving access to the franchise, protecting freedom of expression, and ensuring transparency of governance through freedom of information. In these instances, a preliminary injunction is often the *only* form of success because the order provides the relief requested in the complaint and the case becomes moot by effect of the

injunction. For example, when a plaintiff secures a preliminary injunction that allows a civil rights protest to take place, once the protest is over the case often becomes moot. *See, e.g., Mahoney v. Babbitt*, 113 F.3d 219, 223 (D.C. Cir. 1997) (discussing a preliminary injunction allowing a Christian group to display banners critical of President Clinton's abortion policies along the route of the inaugural parade, and noting that "[f]or obvious practical reasons, [prior restraint First Amendment cases] normally arise in the context of preliminary injunctions"). Similarly, when a plaintiff secures an order requiring the government to produce documents pursuant to the Freedom of Information Act, once the government produces those documents, the case often becomes moot. *Cf. Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986) (holding an action seeking an injunction directing the government to provide documents is mooted by production of the documents); *Kaye v. Burns*, 411 F.Supp. 897, 902 (S.D.N.Y. 1976) ("It is inconceivable, however, that the recovery of attorneys' fees could be foreclosed whenever the government chooses to moot an action under the Freedom of Information Act by supplying, during the pendency of the litigation, the material sought in the complaint. . . . To hold otherwise would be to inject an absurd requirement . . . that a case necessarily proceed to final judgment before an award of attorneys' fees may be made.").

When Congress enacted fee-shifting provisions to cover these situations, it intended to encourage enforcement actions that help to preserve these core democratic values. Congress was well aware that certain civil rights actions by their very nature may never result in a final judgment, and it was quite clear that fee awards should nevertheless be available for preliminary relief in appropriate circumstances. Congress explicitly stated that "[t]he

phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, at 7. The term also includes a plaintiff who succeeds "even if the case is concluded prior to a full evidentiary hearing before a judge or jury." *Id.* Congress also noted that "after a complaint is filed, a defendant might voluntarily cease the unlawful practice," and that in these circumstances "a court should still award fees even though it might conclude . . . that no formal relief, such as an injunction, is needed." *Id.* Thus, "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered," *id.* at 8 (emphasis in the original), and awards are appropriate when the plaintiff has "prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." S. Rep. No. 94-1011, at 5.

Congress clearly did *not* intend that plaintiffs be deprived of prevailing party status simply because the relief they sought was time sensitive. And of course defendants are not helpless in these situations; they can immediately appeal orders granting preliminary relief. 28 U.S.C. § 1292(a)(1). To eviscerate fee recovery in such important cases would subvert the important democratic values behind these laws.

V. A Preliminary Injunction Can Confer Prevailing Party Status in Appropriate Circumstances.

This Court should reject a *per se* rule that preliminary injunctive relief can never confer prevailing party status.[5]

[5] To argue, as petitioners do, that a clear rule is needed does not answer the question of what the content of that rule should be. A

(Continued on following page)

Such a rule would be vastly overinclusive, as there are at least three classes of cases in which prevailing party status is appropriate that would be adversely affected by such a *per se* rule: (1) circumstances in which the preliminary injunction signals the likely success of the plaintiff and the defendant capitulates in response; (2) circumstances in which the preliminary injunction provides the relief sought in the action and the case becomes moot by operation of the injunction; and (3) situations in which the preliminary injunction gives the plaintiff some, but not all, of the relief she seeks. Congress intended all of these circumstances to confer prevailing party status when it enacted Section 1988. *See* H.R. Rep. No. 94-1558, at 7 (stating that the fact that defendants voluntarily cease unlawful practices or the case does not go to trial should not defeat a fee award); S. Rep. No. 94-1011, at 5 (stating that a fee award is appropriate if the plaintiff prevails on any important matter even if he does not prevail on all issues).

Denying fee recovery is particularly inequitable when the defendant's own actions deprive the plaintiff of the opportunity to obtain a final judgment on the merits, and petitioners wisely acknowledge that such a result is not required by the facts presented here. *See* Petr.'s Br. 32 & n.21. Strategic capitulation presents a plaintiff who has invested time and resources into obtaining preliminary relief that furthers the public interest with a truly Pyrrhic victory. Any remedy the plaintiff obtains in this way is substantially diminished by the fact that she must bear

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blanket rule that preliminary injunctions *always* confer prevailing party status, with the appropriate fee (if any) left to the discretion of the district court, also provides a bright line rule that better serves the congressional purpose behind Section 1988.

her own costs of enforcement, thus eviscerating the intent behind the fee-shifting provision. *See* S. Rep. No. 94-1011, at 2 ("[C]itizens must have the *opportunity* to recover what it costs them to vindicate these rights in court.") (emphasis added). Perhaps more of concern, in the long run such a dynamic will ensure that far fewer civil rights enforcement actions will be brought in the first place. As the research presented in this brief attests, attorneys understandably are reluctant to take on meritorious claims for equitable relief when defendants can easily and unilaterally defeat fee recovery.

Denying prevailing party status to plaintiffs when the case becomes moot by operation of the preliminary injunction itself would make such plaintiffs victims of their own success. To preclude prevailing party status in these cases would eviscerate fee recovery in entire classes of enforcement actions that further core democratic values, such as actions to protect freedom of expression, to obtain information from the government, or to preserve access to the franchise. It would be particularly perverse to deny fee recovery in such important civil rights actions simply because by definition, obtaining the very relief the plaintiffs sought rendered the action moot.

When a preliminary injunction does not confer *any* of the relief the plaintiff sought from the defendant and a final, adverse ruling against the plaintiff is eventually entered, it may well be that conferring prevailing party status is inappropriate, but *amici* do not believe that situation is presented here. A more accurate characterization is that the respondent obtained some, but not all, of the relief she sought from petitioners, and therefore this case fits within the third category of cases outlined above. Comparing the relief sought in the complaint with the

relief the respondent actually obtained from the petitioners as a result of the court's order indicates that the respondent obtained at least some of the relief she sought. *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (holding that success on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit confers prevailing party status). The complaint in this action requested seven different forms of relief (apart from attorney's fees), including "injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." Compl., ¶ 43(a). The district court granted the respondent's request for a preliminary injunction permitting this protest, ordering that "Defendants shall neither prevent nor interfere with Plaintiff's planned event on February 14, 2003." *Wyner v. Struhs*, 254 F.Supp. 2d 1297, 1304 (S.D. Fla. 2003). Petitioners chose not to appeal that ruling and the protest went forward on February 14, 2003, thus providing the respondent with all of the relief that she requested in paragraph 43(a) of the complaint. Indeed, had the respondent requested only the relief in paragraph 43(a), there would be no question that she had prevailed in this action.

It is well established that complete relief is not required to obtain prevailing party status. Where a plaintiff obtains some, but not all, of the relief she seeks, she "has crossed the threshold to a fee award of some kind," even if no final adjudication of the merits ever takes place. *Tex. State Teachers Ass'n,* 489 U.S. at 791-92; *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This Court has held that district courts should exercise their discretion in

circumstances such as these to award fees that are proportionate to the degree of success enjoyed by the plaintiff. *Hensley*, 461 U.S. at 436-37. The judge who presides over a case also hears the fee petition, and thus is in the best position to evaluate the relative success of the plaintiff and to balance the competing equities in the context of the case. What fee, if any, is appropriate is a decision that can be safely left to the discretion of the district court. Indeed, there is no evidence that judges have abused their discretion in awarding fees that are proportionate to plaintiffs' success.

Unfortunately, the case at hand does not provide a suitable vehicle for sorting out these difficult policy issues. This is not a situation in which the trial court granted a preliminary injunction that merely preserved the status quo and then ultimately ruled for the defendants at trial. Nor is it a case in which the defendant's actions or the operation of the preliminary injunction itself rendered the entire claim moot; these are the kinds of claims that raise serious concerns about preserving incentives for attorneys to represent indigent civil rights plaintiffs. Instead, the case at hand at best offers up convoluted facts in which the respondent obtained some of the relief she sought in the complaint, but intervening factual developments affected the court's later decision on her other requests for relief. To complicate matters further, this case also involves difficult distinctions between facial and as applied challenges in the First Amendment context. Given that this case does not clearly or cleanly present the key policy issues regarding prevailing party status and injunctive relief, the Court may wish to consider dismissing certiorari as improvidently granted, or remanding for further proceedings. At the very least, however, this Court should

reject an overinclusive *per se* rule and leave these important questions for later resolution with an appropriate factual predicate.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

MICHAEL W. SOLE, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Petitioners,

v.

T.A. WYNER, GEORGE SIMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, 23 OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff who obtains a preliminary injunction but does not prevail on the merits should be considered a "prevailing party" under 42 U.S.C. § 1988.

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INTERESTS OF AMICI

The States must regularly defend themselves in court against a wide array of claims, many of which involve attorney fee shifting statutes such as 42 U.S.C. § 1988. The case at bar presents a scenario that frequently occurs for the States: a court grants a preliminary injunction, but, following a trial on the merits, the state statute, regulation or official action is ultimately vindicated. Awarding attorneys' fees to a plaintiff who obtains a preliminary injunction and nothing else would cause a considerable drain on the States' public purse. For smaller governmental units within a State, awarding attorneys' fees for a preliminary injunction could amount to a substantial portion of their budget. Moreover, States face tremendous fiscal pressure as they seek to provide adequate funding for education, law enforcement, health care, roads and other core services. The States have a strong interest in reducing the costs associated with unmeritorious lawsuits and in freeing such resources for more deserving ends. States also have a duty to ensure that their laws are faithfully observed. If a plaintiff can recover attorneys' fees for a preliminary injunction, even in a case that is ultimately determined to be without merit, States and local governments would face costly disincentives to enforce their laws.

The States urge this Court to reverse the judgment below and to reaffirm that a plaintiff cannot recover attorneys' fees unless the plaintiff has prevailed on the merits or has obtained a court-ordered consent decree.

SUMMARY OF ARGUMENT

Under 42 U.S.C. § 1988, a "prevailing" plaintiff is entitled to attorneys' fees. Under the plain language of this

provision, a plaintiff cannot be said to have "prevailed" when the plaintiff has failed to achieve victory on the merits. This Court's precedents confirm that preliminary victories do not suffice to make a plaintiff a "prevailing party" if these initial victories are not followed by a favorable resolution of the merits of the case. Preliminary injunctions, by definition, do not constitute relief on the merits. While a court examines the *anticipated* merits of a plaintiff's claim in deciding whether to grant a preliminary injunction, this proceeding does not resolve the actual merits of a claim or lawsuit. When the balance of harms weighs heavily in a plaintiff's favor, as it often does, the value of the merits analysis at the preliminary injunction stage is further diminished. Moreover, during the course of litigation, a plaintiff may secure a favorable disposition in a number of preliminary contexts, such as discovery, class certification or summary judgment. Unless these initial successes translate into a favorable resolution of the underlying merit of a claim or claims, a plaintiff will not qualify as a "prevailing party."

This Court has stated that attorneys' fees are proper if the plaintiff has prevailed on a "significant issue" or has obtained a "material alteration of the parties' legal relationship." An examination of this Court's jurisprudence as a whole, rather than selected phrases viewed in isolation, shows that obtaining a preliminary injunction, without more, does not meet either of those two standards. The legislative history of § 1988 confirms that plaintiffs should not be awarded attorneys' fees in this situation. Congress enacted the statute to ensure that wronged citizens would be able to obtain a vindication of their rights. In the case at bar, the lower courts held that the plaintiffs' rights were *not* violated.

Finally, some courts of appeals have incorrectly awarded attorneys' fees to certain plaintiffs who obtained a preliminary injunction but whose action later became moot. These courts justify the award of attorneys' fees on the basis that the preliminary injunction allowed the plaintiff to accomplish one of the goals of the litigation, or because the preliminary injunction prompted a change in the plaintiff's favor. First, these decisions cannot be reconciled with this court's cases. These decisions have the effect of resurrecting the "catalyst" theory this Court recently buried. Moreover, this Court has previously held that a lawsuit's mootness prior to the resolution of the merits will not entitle a plaintiff to attorneys' fees. In addition, the uncertainty associated with awarding attorneys' fees for some preliminary injunctions but not for others would have the undesirable effect of causing significant litigation on the collateral issue of attorneys' fees. If a plaintiff succeeds in obtaining relief on the merits, attorneys' fees should follow. Where a plaintiff has failed to obtain a favorable resolution of the underlying merits, a preliminary injunction affords no basis to award attorneys' fees.

ARGUMENT

I. A PLAINTIFF WHO OBTAINS A PRELIMINARY INJUNCTION BUT ULTIMATELY LOSES THE CASE ON THE MERITS IS NOT A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

A. The Plain Meaning of the Term "Prevailing Party" Precludes a Recovery of Attorneys' Fees When the Plaintiff Loses on all of His Claims.

1. The Common, Ordinary Understanding of the Term "Prevailing Party" Requires Ultimate Victory, Not Success That Is Limited to a Preliminary Stage of Litigation.

The applicable statute, 42 U.S.C. § 1988(b), provides in relevant part that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs. . . ." The term "prevailing party" has a "rather clear meaning." *Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 607 (2001). To prevail, whether in the realm of sports, politics, armed conflict, or law, entails more than a preliminary victory that is followed by ultimate defeat.

Definitions from legal dictionaries in use in 1976, when § 1988 was enacted, confirm that a party's success in a preliminary round of litigation does not by itself render a party a "prevailing party." For example, BLACK'S LAW DICTIONARY 1352 (4th ed. 1968), provided the following definitions of "prevailing party": (1) "That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, even though not prevailing

on the main issue even though not to the extent of his original contention"; (2) "The one in whose favor the decision or verdict is rendered and judgment is entered"; (3) "The party ultimately prevailing when the matter is finally set at rest"; (4) "*To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.*" *Id.* (emphasis added).[1] Similarly, BALLENTINE'S LAW DICTIONARY 985 (3rd ed. 1969), stated that "[t]o be a prevailing party does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it. If he has, he is a prevailing party." *Id. See also* BOUVIER'S LAW DICTIONARY 973 (Baldwin's student ed. 1934) (same).

In *Buckhannon*, this Court cited the definition from BLACK'S LAW DICTIONARY 1145 (7th ed. 1999), that defines a "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorneys' fees to the prevailing party). – Also termed successful party." *Buckhannon*, 532 U.S. at 603. This definition is entirely consistent with the definitions cited above that were in existence at the time of the drafting of § 1988.

In both contemporary parlance and at the time of the enactment of § 1988, the term "prevailing party" does not include success during a preliminary round that is

[1] The following edition of Black's Law Dictionary retained this definition. BLACK'S LAW DICTIONARY 1069 (5th ed. 1979).

followed by ultimate defeat. The plaintiffs in the case at bar lost the merits of their suit. Therefore, they cannot be considered "prevailing parties" and cannot obtain attorneys' fees.

2. This Court's Jurisprudence Confirms That a Plaintiff Who Wins at a Preliminary Stage Is Not Entitled to Attorneys' Fees if the Plaintiff Does Not Obtain a Favorable Resolution of the Merits.

This Court's decisions have adhered to the understanding that a party has not prevailed when an initial victory is followed by defeat on the merits. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the lawsuit arose out of a fatal shootout between members of the Black Panther Party and Chicago police. *Hanrahan,* 446 at 755 n.1. The district court directed a verdict for the government officials, but the court of appeals reversed and remanded the case back to the district court for a new trial. *Id.* at 753. The court of appeals also awarded the plaintiffs attorneys' fees for their successful appeal. *Id.* This Court granted certiorari and reversed. This Court noted that Congress contemplated the award of fees *pendente lite* in some cases. *Id.* at 757. However, to qualify for such an interlocutory award, a party must "establish[] his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Id.* Because the plaintiffs had not yet prevailed on the merits of their claims, this Court held, the court of appeals improperly awarded attorneys' fees. *Id.* at 758-59. This Court noted that, on remand, should the jury decide in a manner

adverse to the plaintiffs' claims, "it could not seriously be contended that the respondents had prevailed." *Id.* at 759.

This Court revisited the issue in *Hewitt v. Helms*, 482 U.S. 755 (1987), framing the issue in terms that are strikingly apposite to the case at bar: "whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorneys' fees." *Id.* at 757. The inmate plaintiff in *Hewitt,* Aaron Helms, filed an action under § 1983, alleging that the use of hearsay at a prison disciplinary hearing and the delay in resolving misconduct allegations against him violated his constitutional rights. *Id.* Six months after Helms was released, the district court entered summary judgment in favor of the government without addressing the issue of qualified immunity. *Id.* at 757-58. The court of appeals reversed, concluding that Helms had been denied his constitutional right to due process. The court of appeals remanded the case to the district court, instructing it to enter summary judgment in favor of the inmate on his constitutional claims unless the government officials could establish an immunity defense. *Id.* at 758. On remand, the district court concluded that the officials benefited from qualified immunity and granted summary judgment in their favor. The district court denied Helms' motion for attorneys' fees, concluding he was not a "prevailing party." *Id.* at 759. The court of appeals reversed, awarding attorneys' fees based on its prior decision that Helms' constitutional rights had been violated. *Id.*

This Court vacated the award of attorneys' fees, concluding that Helms was not a "prevailing party." *Id.* at 759-60. The Court observed that a party must "receive at least some relief on the merits of his claim before he can

be said to prevail." *Id.* at 760. Helms had obtained neither damages, injunctive relief nor any declaratory judgment, nor had he received relief without benefit of a formal judgment such as a consent decree or a settlement. *Id.* at 760. This Court further held that the fact that Helms had obtained a favorable judgment on appeal did not make him a prevailing party, *id.*, and concluded that Helms' initial success on appeal could not be analogized to success in a declaratory judgment action because the district court was left to determine whether the plaintiff ultimately should be awarded any relief. *Id.* at 760. This Court reasoned that "[t]he most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made." *Id.* at 760. In sum, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' Any other result strains both the statutory language and common sense." *Id.* at 763.

A federal court reviewing a request for attorneys' fees need not parcel out who prevailed during the various stages of litigation. Instead, "the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits." *Kentucky v. Graham*, 473 U.S. 159, 164 (1985). That is because "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Id.* at 165. "Section 1988 simply does not create fee liability where merits liability is nonexistent." *Id.* at 168. As this Court noted in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685

(1983), "ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it."

3. A Preliminary Injunction Does Not Constitute Relief on the Merits.

In its decision below, the Eleventh Circuit concluded that the preliminary injunction "decided a substantive issue . . . and thus was [a decision] on the merits." *Pet. App.* 3a. This conclusion was incorrect, for two reasons. First, when considering an application for a preliminary injunction, a trial court weighs the *anticipated* merits of the plaintiff's case, not the merits proper. At this stage of litigation, a trial court is simply not in a position to resolve the underlying merits of the case. Second, the merits inquiry is diluted by the balancing of harms. Consequently, a preliminary injunction cannot be equated with "relief on the merits" for purposes of determining whether a plaintiff is a "prevailing party."

Federal Rule of Civil Procedure 65 does not articulate a standard for preliminary injunctions. However, the "federal circuit courts are largely in agreement as to the substance of the standard that generally governs the issuance of a preliminary injunction." Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111 (2001). Courts consider the following factors:

> (1) the moving party's likelihood of success on the merits; (2) irreparable harm to the moving party if the preliminary injunction is improperly denied; (3) irreparable harm to the non-moving

> party if the preliminary injunction is improperly granted; and (4) the "public interest."

Id. (citing cases).

From these factors, it is apparent that preliminary injunctions, which are, by definition, preliminary, do not actually resolve the merits of the underlying dispute.[2] Instead, a preliminary injunction serves a "limited purpose" which is to "merely preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *See also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947 (2d ed. 1992) ("[A] preliminary injunction is an injunction to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."). Moreover, because the object of a preliminary injunction is merely to freeze the status quo and to prevent irreparable harm until the dispute can be resolved, it does not change the "relationship of the parties" in the sense that this Court has understood the concept.

To be sure, one factor a trial court considers in adjudicating a motion for a preliminary injunction is the anticipated merit of the plaintiff's claims. However, as the Fourth Circuit noted in *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002), "the merits inquiry in the preliminary

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[2] Of course, under Fed. R. Civ. P. 65(a)(2), a court can grant permanent relief when it consolidates the preliminary injunction hearing with a resolution of the merits of the case. This circumstance only strengthens the States' argument that a preliminary injunction, standing alone, does not constitute the sort of "relief on the merits" contemplated by this Court's decisions.

injunction context is necessarily abbreviated." The trial court considering the request for a preliminary injunction must essentially make a prediction of a probable outcome, based on a rudimentary hearing. This initial assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached. Therefore, the granting of a preliminary injunction "by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the injunction." *Id.*

Moreover, as the Fourth Circuit noted in *Smyth*, the inquiry into the merits of the case is further reduced in the context of a preliminary injunction because, in addition to assessing the anticipated merits of a claim, the trial court must also weigh the balancing of likely harms. *Id. See also Yakus v. United States*, 321 U.S. 414, 440 (1944) (the granting of a preliminary injunction turns on the "balance [] [of] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction."). This balancing, in many contexts, will outweigh any assessment of the merits of the allegations. For example, in *Smyth*, the plaintiff sought to avoid the termination of welfare benefits, a circumstance that would strongly incline a court to grant a preliminary injunction irrespective of the trial court's assessment of the underlying merit of the allegations. *Smyth*, 282 F.3d at 271. In environmental cases, a preliminary injunction will issue with great frequency to prevent irreparable harm. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be remedied by money

damages and is often permanent or at least of long duration, *i.e.,* irreparable."). In the case at bar, the district court stressed that the potential injury to the plaintiffs far exceeded any harm to the defendants. *Pet. App.* 15a. Thus, trial courts considering preliminary injunctions are not engaged in a pure merits inquiry. Some courts expressly dilute the merits inquiry if the balance of hardships tips decidedly in favor of the moving party. *See, e.g., Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995). In that circumstance, those courts require that the plaintiff raise only "sufficiently serious questions going to the merits." *Id.* This balancing of interests, while necessary for the granting of a preliminary injunction, does not constitute the sort of relief on the merits this Court has required for a plaintiff to be considered a "prevailing party."

Certainly, a preliminary injunction is an enforceable order – as are orders resolving discovery motions, standing issues, abstention doctrines, class certifications, motions to dismiss or summary judgment motions. For that matter, an erroneous trial court judgment that is later reversed on appeal, as occurred in *Hewitt* and *Hanrahan,* is also temporarily binding. Success on such matters may advance the plaintiff's cause in some fashion, but preliminary victories of this sort do not permit an award of attorneys' fees if they are not followed by a favorable resolution of the merits. A preliminary injunction, in short, "is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760. Before a plaintiff can be said to "prevail," "respect for ordinary language requires that [he] receive at least some relief *on the merits* of his claim." *Buckhannon,* at 604 (emphasis added).

4. A Plaintiff Who Obtains a Preliminary Injunction But Ultimately Loses the Case Has Not Prevailed on any "Significant Issue" or Obtained a "Material Alteration of the Parties' Legal Relationship."

In a number of instances, this Court has noted that a plaintiff who has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit" will be entitled to reasonable attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Texas State Teachers Ass'n v. Garland Indep. Sch. District*, 489 U.S. 782, 789 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In opposing certiorari, the respondents contended that in obtaining the preliminary injunction, they succeeded on a "significant issue." *Br. in Opp.* at 3-4. The respondents also relied on this Court's statements that a plaintiff is a "prevailing party" if he has obtained a "material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. at 111. *See also Garland*, 489 U.S. at 792-93. According to the respondents, their success in obtaining a preliminary injunction materially altered their relationship with the park officials. *Br. in Opp.* at 5-8. An examination of this Court's jurisprudence, rather than isolated statements, shows that the fleeting victory obtained by the plaintiffs here does not satisfy the "significant issue" or "material alteration" standards.

In *Hensley*, mental patients who were involuntarily confined in a state hospital filed an action against the State. 461 U.S. at 426. The lawsuit (1) challenged the constitutionality of treatment and conditions; (2) challenged the placement of certain patients without procedural due process protections; and (3) sought

compensation for the patients' work at the hospital. *Id.* Issue (2) was resolved by consent decree and issue (3) became moot when Congress enacted the Fair Labor Standards Act. *Id.* at 426-27. The remaining issue proceeded to trial and the district court found a number of constitutional violations. *Id.* at 427. The lower courts awarded the plaintiffs' attorneys' fees on all of their claims, including the hours spent in pursuit of the unsuccessful claims. *Id.* at 428.

This Court began its analysis by noting a typical "generous formulation" from the lower courts concerning when plaintiffs may be considered prevailing parties: "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433. This Court concluded that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Id.* at 439. This Court held that the plaintiffs were entitled to attorneys' fees, but only to the extent the fees related to the successful claim. *Id.* at 440.

While *Hensley* said that a plaintiff who had prevailed on a "significant issue" could recover attorneys' fees, the context strongly suggests that this Court meant a final resolution of a claim in the plaintiff's favor. The opinion reflects that the "significant issue" on which the *Hensley* plaintiffs had prevailed was the successful litigation to finality of one of their claims – not merely a preliminary or a collateral issue.

Garland confirmed that prevailing on a "significant issue" or obtaining a "material alteration" of the parties' legal relationship are concepts synonymous with a favorable final resolution of the merits of the allegations. In *Garland*, this Court granted certiorari to review the validity of a test a number of circuits had developed to determine whether a plaintiff was a "prevailing party" under § 1988. Those lower courts required "that a party succeed on the 'central issue' in the litigation and achieve the 'primary relief sought' to be eligible for an award of attorneys' fees under § 1988." *Id.* at 784. The plaintiff schoolteachers in *Garland* had challenged several aspects of school policy relating to teachers' interaction with, and discussion of, teachers' unions. *Id.* at 785. The district court rejected the teachers' claims in nearly all respects but granted relief on one minor claim. *Id.* at 786. On appeal, the court of appeals held that several aspects of school policy violated the teachers' First Amendment rights. *Id.* at 786-87. The school district appealed to this Court, which summarily affirmed the judgment of the court of appeals. *Id.* at 787. In spite of this successful resolution of some of their claims, the lower courts concluded the plaintiffs were not "prevailing parties" because they had not "carried the 'central issue' in the lawsuit nor achieved 'the primary relief sought.'" *Id.*

This Court rejected such a restrictive reading of § 1988. *Id.* at 793. The Court held that to be a prevailing party, a plaintiff must have "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit.'" *Id.* at 791-92 (emphasis added). "At a minimum," the Court noted, "the plaintiff must be able to point to *a resolution* of the dispute which changes the legal relationship between itself and

the defendant." *Id.* at 792 (emphasis added). Reviewing the legislative history of § 1988, this Court concluded that Congress contemplated "interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" *Id.* at 790 (citing S. Rep. No. 94-1011, 94th Cong. 2d Sess. at 5 (1976)). This Court observed that when it summarily affirmed the court of appeals' decision in favor of some of the plaintiffs' constitutional claims, it effectively ended the litigation on these claims. As to those claims, brought to final resolution, the plaintiffs would be entitled to some fee award for their success, even if other issues had been remanded for further proceedings. *Id.* at 790-91. The "central issue" test could not be reconciled with this congressional intent to award interim fees in such circumstances. *Id.* This Court concluded that

> [t]he touchstone of the prevailing party inquiry must be the *material alteration* of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Id. at 792-93 (emphasis added).

More recently, in *Farrar*, this Court again addressed what it takes to "materially alter the relationship between the parties" and what a plaintiff must accomplish to succeed on a "significant issue." In that case, the plaintiff, Joseph Farrar, sought $17 million in damages against various public officials based on an alleged conspiracy to illegally close a school he operated. He eventually obtained a nominal damages award. *Farrar*, 506 U.S. at 106-07.

The district court awarded Farrar attorneys' fees but was reversed by the court of appeals on the basis that Farrar was not a "prevailing party." *Id.*

After reviewing its past decisions, this Court first held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* at 112. A material alteration of the parties' relations has occurred when the plaintiff "becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Because "[a] plaintiff may demand payment for nominal damages no less than" an award of millions of dollars in compensatory damages, a material alteration of the legal relationship between the parties has taken place. *Id.* Nevertheless, this Court went on to hold that obtaining nominal damages under the circumstances of that case did not qualify the plaintiff for any award of attorneys' fees. *Id.* at 115. The degree of Farrar's success was so limited in relation to the object sought by the litigation that the court below properly vacated the district court's award of attorneys' fees. *Id.* at 114-15. This Court's discussion of "material alteration" and the requirement that a plaintiff obtain "some success" once again occurred in the context of a final resolution of one of the claims in favor of one party and against another.

This Court's jurisprudence shows unmistakably that the respondents in the case at bar did not obtain a "material alteration of the parties relationship" and did not prevail on a "significant issue" because they never obtained relief on the merits of their underlying claims.

B. The Legislative History Confirms That Congress Enacted § 1988 to Help Plaintiffs Whose Civil Rights Had Actually Been Violated.

Congress enacted § 1988 in response to this Court's decision in *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). *See Hensley*, 461 U.S. at 429. The plaintiffs in *Alyeska* sought to block the construction of the trans-Alaska oil pipeline, but their lawsuit was ultimately mooted by federal legislation. *Alyeska*, 421 U.S. at 244-45. Nevertheless, the court of appeals concluded that the plaintiffs had performed an important public service and awarded them attorneys' fees under a "private attorney general" theory. *Id.* at 245-46.

This Court, upon review of the historical principles that animated fee-shifting, reversed the court of appeals. The Court noted that the longstanding practice under the "American Rule" was that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The Court contrasted the practice under the American Rule with the way attorneys' fee awards developed in England. There, the Court noted, "counsel fees are regularly awarded to the prevailing party." *Id.* at 247. The Court observed that, as early as 1796, its practice was to adhere to the American Rule absent congressional action. *Id.* at 249. The Court declined to fashion a "far reaching exception" to the American Rule because doing so would "make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 247, 269. The importance of the policy issues underlying a particular statute did not warrant "jettison[ing] the traditional rule against nonstatutory allowances to the prevailing party." *Id.* at 263.

Following *Alyeska*, a plaintiff who prevailed in a civil rights action would not be entitled to attorneys' fees. Recognizing that this would deter many meritorious lawsuits by plaintiffs who could not afford to hire attorneys, Congress promptly enacted § 1988. The legislative history is clear that Congress sought to ensure that plaintiffs whose rights *have actually been violated* are able to vindicate those rights in court because such plaintiffs would be able to obtain the assistance of counsel. There is no support in the legislative history for the proposition that a plaintiff whose rights have not been violated, but who wins a preliminary battle in the course of litigation, is entitled to attorneys' fees.

For example, the report from the House Judiciary Committee for the legislation that became § 1988 notes that "[i]n many instances where [civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 94-1558, 94th Cong. 2d Sess. at 1 (1976). "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." *Id.* The examples provided in the report support the conclusion that Congress was concerned with court access for persons who are actual victims, rather than imagined victims, of civil rights abuses. *Id.* at 6. The report of the Senate Judiciary Committee expressed the same concerns. S. Rep. No. 94-1011, at 2 (1976) (attorney fee provisions necessary to ensure that "those who violate the Nation's fundamental laws" do not "proceed with impunity."). Like the House, the Senate sought to ensure that plaintiffs who had vindicated their rights could obtain attorneys' fees. *Id.* at 5. This legislative history shows that a "prevailing party" was one who had

established a violation, or a threatened violation, of a right and not an imagined violation.[3]

Congress had no intention of providing incentives for plaintiffs to file meritless lawsuits or to encourage litigation for its own sake. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) ("when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violation of federal law."). *Cf. Hensley*, 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (noting that § 1988 was not meant to serve as a "'relief fund for lawyers.'") (quoting 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Kennedy)). Consistent with this legislative intent, this Court should confirm that plaintiffs who are ultimately vindicated should receive their reasonable attorneys' fees under § 1988; those who file lawsuits without prevailing on the merits should receive no fee award.

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[3] The debates in the House and Senate only confirm this understanding. 122 Cong. Rec. 31,171 (1976) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights.") (remarks of Sen. Scott); *id.* at 31,472 (legislation needed to ensure plaintiffs can "vindicate basic human rights") (remarks of Sen. Kennedy); *id.* at 31,832 (attorneys' fees needed to ensure the "violation of fundamental human rights does not go unchallenged") (remarks of Sen. Hathaway); *id.* at 33,313 (equal access to courts needed "to vindicate congressional policies and enforce the law") (remarks of Sen. Tunney); *id.* at 35,126 ("If Federal laws providing for the protection of civil and constitutional rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees.") (statement of Rep. Drinan); *id.* at 35,127 (remedy needed to ensure "the availability of justice" for those who have been "deprived of their civil rights") (remarks of Rep. Holtzman); *id.* at 35,128 (legislation needed because "[m]ost Americans . . . cannot afford to hire a lawyer if their constitutional rights are violated or if they are the victims of illegal discrimination.") (remarks of Rep. Seiberling).

II. EVEN WHEN THE CASE BECOMES MOOT AFTER A PRELIMINARY INJUNCTION IS GRANTED, A PLAINTIFF IS NOT ENTITLED TO ATTORNEYS' FEES UNLESS HE ALSO OBTAINS A FAVORABLE RESOLUTION OF THE MERITS.

Some courts of appeals have concluded that a plaintiff who has obtained a preliminary injunction might be entitled to attorneys' fees if mootness has precluded the resolution of the merits of the dispute. These courts have devised a variety of tests to determine when such plaintiffs should receive attorneys' fees. For example, in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), the District of Columbia Circuit held that the plaintiffs were prevailing parties because their preliminary injunction prompted the Secretary of the Department of Agriculture to issue a new regulation that rendered the case moot. *Id.* at 943. In the court of appeals' view, the plaintiffs were prevailing parties because their lawsuit "caused a substantial change in the legal relationship between the parties and provided plaintiffs with concrete and irreversible relief." *Id.* at 946. Similarly, in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), the plaintiff obtained a preliminary injunction that excluded a report from a disciplinary hearing. Once the hearing took place, the issue became moot. *Id.* at 1095-96.

The fact that a case becomes moot following the preliminary injunction does not afford the court a basis to award attorneys' fees. Plaintiffs who have not established that their rights were, in fact, violated, should not receive attorneys' fees. If attorneys' fees are unwarranted when a plaintiff receives a favorable judgment on the merits *after* the case has become moot, *Rhodes v. Stewart*, 488 U.S. 1, 4

(1988) (*per curiam*), then *a fortiori* a plaintiff is not entitled to attorneys' fees when the case becomes moot *without any* final resolution of the merits. In addition, the fact that a defendant's actions render a case moot, either in reaction to the lawsuit or for other reasons altogether, does not by itself entitle a plaintiff to attorneys' fees. In *Buckhannon,* 532 U.S. at 605-06, this Court rejected the notion that a plaintiff should receive attorneys' fees because the plaintiff's lawsuit functioned as a "catalyst" for the defendant's actions.

Those lower courts that award attorneys' fees in cases that become moot following the preliminary injunction do not automatically award attorneys' fees in such situations. Rather, the award of attorneys' fees is limited to those plaintiffs who satisfy a particular legal test. *See, e.g.*, *Select Milk Producers, Inc.*, 400 F.3d at 946; *Watson*, 300 F.3d at 1095-96. If this Court were to adopt such a rule, regardless of its precise contours, plaintiffs will undoubtedly try to fit their facts into the strictures of the test and defendants will have an obvious incentive to object. Protracted litigation on the issue of attorneys' fees will be sure to follow. The Court has stressed that "[a] request for attorneys' fees should not result in a second major litigation" and has therefore "avoided an interpretation of the fee-shifting statutes that would have 'spawned a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (citations omitted). In contrast, determining which party has prevailed on the merits of a claim is not a difficult inquiry.

The rule should be straightforward – to be a "prevailing party" under 42 U.S.C. § 1988, a plaintiff must

prevail on the merits of at least one of his claims.[4] A preliminary injunction, like initial success on appeal, does not qualify when a plaintiff's initial success is followed by an adverse result or by mootness.

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[4] By "ultimate resolution" the States do not suggest that the litigation must be concluded in its entirety. If a plaintiff prevails on the merits of a discrete claim before the overall litigation concludes, as in *Hanrahan,* the plaintiff could obtain *pendente lite* attorneys' fees for the claim on which he had prevailed. *Hanrahan*, 446 U.S. at 757. Furthermore, the States do not question that a plaintiff who has obtained a court-ordered consent decree is a prevailing party entitled to attorneys' fees. *Buckhannon*, 532 U.S. at 605.

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Eleventh Circuit should be **REVERSED**.

Respectfully submitted,

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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, Secretary, Florida Department of Environmental Protection, and TERENCE COULLIETTE,
Petitioners,

v.

T.A. WYNER and GEORGE SIMON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs who file suit alleging a violation of their constitutional rights are "prevailing parties" for purposes of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, when they obtain preliminary injunctive relief but ultimately lose on the merits.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include county and municipal governments and officials throughout the United States.[1] *Amici*'s members are frequently sued for the "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983.[2] The Civil Rights Attorney's Fees Awards Act provides that in section 1983 actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." *Id.* § 1988(b).

The liability for attorney's fees under section 1988 has significant implications for budgeting and delivery of services by state and local governments. Funds that must be allocated to the payment of attorney's fees are unavailable for other public purposes. *Amici* fully acknowledge their obligation to pay attorney's fees under section 1988 for deprivations of civil rights. In this case, however, the district court concluded that there had been no violation of respondents' rights, and yet petitioners were held liable for attorney's fees because the district court, in an expedited preliminary proceeding, issued interlocutory injunctive relief. A rule that permits civil rights plaintiffs to recover attorney's fees even in cases that prove meritless can only produce equally meritless litigation, burdening local governments with both unwarranted liability for attorney's fees and the costs of defending

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

[2] In the 12-month period ending March 31, 2006, 31,240 civil rights cases were filed in the federal courts in which the United States was neither a plaintiff nor a defendant. *See* Office of Judges Programs, Administrative Office of the U.S. Courts, Federal Judicial Statistics (March 31, 2006), tbl. C-2.

such litigation. Accordingly, *amici* ask this Court to confine section 1988 liability to its proper scope—cases in which the civil rights plaintiff obtains a judgment that her rights have been violated.

STATEMENT OF THE CASE

John D. MacArthur Beach State Park is a public park of the State of Florida that includes nature trails and a beach. Pet. App. 11a, 23a-24a. A portion of the park was once considered a "clothing optional" beach before it came under the State's control. *Id.* at 11a, 24a. Applicable state regulations, however, prohibit nudity at state parks: Florida Administrative Code Rule 62D-2.014(7)(b) provides that "[i]n every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering." *Id.* at 27a-28a. In addition, applicable regulations authorize park management to regulate the time, place, and manner of expressive activities in the parks: Florida Administrative Code Rule 62D-2.014(18) provides:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

Pet. App. 26a.

In 1990, respondent T.A. Wyner ("Wyner"), as part of a protest against the State's restrictions on nudity at the beach, appeared on the beach while clothed only in an opaque copy of the Bill of Rights. Pet. App. 11a, 24a-25a. Wyner was arrested and charged with disorderly conduct, but the charges were later dropped. *Id.* at 11a, 25a. Wyner filed an action seeking damages for a violation of her civil rights and obtained a judgment in her favor, but that award was later vacated on appeal on grounds of qualified immunity. *Id.* at 11a; *see DeWald v. Wyner*, 674 So. 2d 836 (Fla. Dist. Ct. App. 1996).

In 1991, Wyner directed and performed in the park a play entitled "MacArthur: The Man and the Beach," which included nude scenes. Pet. App. 11a, 25a. She and others were arrested, but the charges were subsequently dropped, and another damages action ensued. *Id.* That litigation was settled by the parties' agreement that when Wyner wished to perform the play at the park, she would give the park's manager at least fourteen days notice along with an estimate of the number of participants and audience members, performances would take place at least 100 yards from the nearest boardwalk, and Wyner would place a cloth screen around the area in which the play was to be performed. *Id.* at 11a-12a, 25a-26a; J.A. 22-23.

At least twice following that settlement, Wyner performed the play in the park but failed to utilize the screen. Pet. App. 12a, 26a. As Wyner acknowledged in her testimony at the injunction hearing in this case, when she performed the play in 1996 she did so with no screening and with nudity. J.A. 47-48. She performed the play again in 2000, but when park personnel erected a screen the nude performers again presented the play outside of the screen. J.A. 53-55.

In mid-January 2003, Wyner contacted petitioner Terence Coulliette, the park's manager, and notified him that she planned to produce a temporary art installation consisting of

nude bodies arrayed in the shape of a peace symbol on February 14. Pet. App. 27a. Coulliette requested written notice, and on January 29, Wyner gave notice by email. *Id.* at 12a-13a, 27a. The email stated that the event would last approximately three hours, the installation would be presented during approximately 90 minutes, and that Wyner estimated that there would be no more than 50 participants. *Id.* at 13a, 29a-30a; J.A. 29-30. Couilliette submitted Wyner's request to the Bureau Chief of the Parks District "for his review, consideration, and input." J.A. 26. Thereafter, on February 6, Coulliette sent Wyner a letter stating that the performance would be permitted but that the participants would have to comply with the park regulation prohibiting nudity. *Id.* at 29-30.

On February 12, 2003, Wyner and respondent George Simon filed suit against Park Manager Coulliette and David B. Struhs, who was then the Secretary of the Florida Department of Environmental Protection, alleging that the anti-nudity and time, place, and manner regulations at the park violated the First Amendment and therefore effected an actionable deprivation of rights under 42 U.S.C. § 1983. J.A. 10-20.[3] Respondents simultaneously sought a temporary restraining order and/or a preliminary injunction on the ground that the park's refusal to allow the planned February 14 nude peace event violated their First Amendment rights. *Id.* at 32-34.[4]

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[3] The complaint also contained a count asserting a right to nude protest under the Florida Constitution. J.A. 19. Respondents eventually agreed to the dismissal of this count. J.A. 98-99.

[4] Subsequent to the time that certiorari was granted by this Court, Secretary Struhs was succeeded in office by Michael W. Sole, who has been substituted as a petitioner under this Court's Rule 35.3. Throughout this brief, we will refer to the original defendants named in the complaint as "petitioners," even though Secretary Sole did not technically become a petitioner until after this case arrived at this Court.

The district court held an injunction hearing on respondents' motion for injunctive relief the next day, on what the court acknowledged was "exceedingly short notice." J.A. 37. Petitioners' counsel and witness were unable to attend the hearing, and participated by telephone. J.A. 36. Petitioners' counsel added that they had received "short notice . . . and we don't know much of what is going on, but, as far as I can tell, there probably aren't any disputed facts." *Id.* at 38. Petitioners' counsel did not receive copies of respondents' newly-introduced exhibits and had no notice of those exhibits other than listening as their contents were read over the phone. *Id.* at 52-56. Counsel for petitioners objected on the ground that respondents' counsel "hasn't shown us any of these exhibits in advance of the hearing so we could review them," *id.* at 55, but the district court overruled the objection "because of the time constraints of a preliminary injunction or temporary restraining order." *Id.* at 56.

At the conclusion of the hearing, the district court expressed concern about the discretion exercised by the park manager, J.A. 93-94, and added that the use of a screen and warning signs would constitute "alternatives that would be far less restrictive and could still meet the government interests, which would appear to be to protect beach-goers from being exposed to nudity . . . ." *Id.* at 94. The court added, "It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide issues on this quick a basis, but I do feel like this meets the test of the injunction." *Id.* at 95.

In its written order granting the preliminary injunction handed down two weeks after the hearing, the district court applied a four-part test governing the issuance of such relief. The court inquired whether respondents had demonstrated "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the

opposing party; and (4) that, if issued, the injunction would not be adverse to the public interest." Pet. App. 14a. The court concluded that respondents faced irreparable injury absent injunctive relief, that respondents' injuries would outweigh any injury to petitioners from issuance of an injunction, and that the public interest favored the issuance of injunctive relief to protect First Amendment rights. *Id.* at 14a-15a.

On the likelihood of success on the merits, despite respondents' claim that the park manager exercised effectively unchecked discretion over expressive activities in the park under the time, place, and manner regulation and therefore was free to engage in discrimination on the basis of the content or viewpoint of speech, the court was willing to assume that the park's policies were content-neutral. Pet. App. 16a-17a. The district court also concluded that the prohibition on nudity advanced the legitimate government interest in protecting unwilling park users from exposure to nudity. *Id.* at 17a-18a. The court ruled, however, that the prohibition was not adequately tailored because the alternatives utilized in the prior settlement could adequately serve these governmental interests. *Id.* at 18a. The court issued injunctive relief against enforcement of the anti-nudity rule during the planned event on February 14, while permitting use of the measures utilized in the prior settlement. *Id.* at 19a-20a.

On February 14 respondents conducted their nude peace-symbol installation at the beach. They did not, however, remain behind the cloth screen provided. Pet. App. 4a. *See also id.* ("a fair reading of the record shows that plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works").

On January 28, 2004, the district court, ruling on the parties' cross-motions for summary judgment, concluded that the park's anti-nudity and time, place, and manner regulations

were valid content-neutral regulations that were narrowly tailored to advance substantial government interests. Pet. App. 36a-46a. The court entered judgment against respondents and in favor of petitioners. *Id.* at 46a; J.A. 145.

On February 27, 2004, respondents filed a motion for attorney's fees and taxable costs. J.A. 6. On August 16, 2004, the district court ruled that because respondents had obtained preliminary relief on February 13, 2003, they were "prevailing parties" entitled to recover their attorney's fees under section 1988 for work performed on the preliminary injunction litigation. Opp. App. 3a-4a.[5] The court added, however, that because final judgment was entered in favor of petitioners, they were entitled to costs. *Id.* at 10a. Accordingly, the district court entered judgment in favor of respondents for attorney's fees of $25,924.50, and also granted petitioners' motion to tax costs. *Id.* at 12a-13a.

Petitioners appealed the judgment against them for attorney's fees, and in a brief unsigned opinion, the court of appeals affirmed. Pet. App. 5a. On the question whether respondents were prevailing parties within the meaning of the Civil Rights Attorney's Fees Awards Act, the court wrote: "To qualify as a prevailing party, the plaintiff must obtain the primary relief sought in the case." *Id.* at 2a. The court then concluded that "the preliminary injunction in this case decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants—and thus was on the merits." *Id.* at 2a-3a. The court added that because the district court had granted summary judgment against the plaintiffs based "on new facts presented at the summary judgment hearing which demonstrated that the less restrictive alternative was not sufficient," the preliminary injunction was not "based on a mistake of law." *Id.* at 5a.

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[5] The district court's "Omnibus Order" containing its rulings on fees and costs is an appendix to respondents' brief in opposition to the petition for certiorari. Citations to this order are abbreviated "Opp. App."

SUMMARY OF ARGUMENT

In an action under section 1983, the Civil Rights Attorney's Fees Awards Act permits a district court to award attorney's fees to a "prevailing party." 42 U.S.C. § 1988. A party who ultimately loses her case, even if she obtained preliminary injunctive relief, is not a prevailing party within the meaning of section 1988.

In common parlance, one prevails—in litigation or any other type of contest—by achieving success that is lasting. No one prevails by means of a transient victory that is later undone. The precedents construing section 1988 are based on just this recognition—it is settled that a prevailing party must succeed on the merits of her claim, and not merely in preliminary skirmishing, even if it results in a transient victory in the form of a preliminary injunction. Preliminary injunctions, after all, are not rulings on the merits, but rather are based on the district court's prediction as to the plaintiff's likelihood of success on the merits—a prediction that proved in this case to be erroneous. At the conclusion of this litigation, respondents were losers, not winners. The district court entered judgment against respondents, and rejected their attacks on the park regulations at issue. A litigant who ultimately leaves the courthouse empty-handed is not a prevailing party, regardless of whatever success that litigant may have enjoyed in the earlier stages of the litigation.

Accordingly, respondents were not prevailing parties in this case. Their only victory in this case was a temporary one; it had disappeared within 72 hours of the time that they had filed suit, when the preliminary injunction, by its terms, expired. Moreover, that preliminary victory was not on the merits of this lawsuit; it instead was under the equitable test that governs preliminary injunctive relief, and reflected only the district court's preliminary assessment of the merits. At the end of the litigation, the district court upheld the park regulations that respondents had contested; and the preclusive

force of its judgment will prevent respondents from mounting any future challenges to those regulations. Respondents were not the prevailing parties in this litigation.

It is equally settled that section 1988 should be construed in light of the congressional purpose to provide an incentive for attorneys to bring meritorious civil rights litigation. This case was not meritorious. The First Amendment does not grant anyone a right to go naked at a public beach, even as part of a protest. The park's anti-nudity regulations were perfectly constitutional; indeed, their validity is no longer at issue in this litigation.

States and local governments are properly obliged to pay attorney's fees when there has been a violation of a plaintiff's civil rights, but in this case respondents' rights were never violated. Nothing in section 1988 or the cases construing it suggests that plaintiffs should be permitted to recover attorney's fees in a case in which they establish no violation of their civil rights, and obtain no relief on the merits. If this Court were to hold, however, that even litigation that fails on the merits can give rise to attorney's fee liability if the plaintiff can obtain preliminary relief, it will create a perverse incentive for plaintiffs to bring nonmeritorious cases. Not only is preliminary injunctive relief is easier to obtain than a final judgment on the merits, but the prospect of mounting legal fees will also encourage governmental defendants to settle cases quickly rather than paying escalating attorney's fee awards for preliminary relief. Such a result is utterly at odds with the very statute under which respondents seek to recover attorney's fees.

ARGUMENT

Despite a preliminary victory, respondents ultimately failed to establish any violation of their civil rights. The district court awarded respondents a preliminary injunction, but only by applying the equitable standards governing such requests.

When the district court subsequently reached the merits, it upheld the regulations that respondents had challenged; and it never concluded that respondents' rights were violated. There is no basis for construing the Civil Rights Attorney's Fees Awards Act to require state and local governments to divert scarce public resources to the payment of plaintiffs' attorney's fees in cases in which there has been no violation of the plaintiffs' civil rights. The judgment of the court of appeals should be reversed.

I. A PLAINTIFF WHO OBTAINS PRELIMINARY INJUNCTIVE RELIEF BUT WHO LATER LOSES ON THE MERITS IS NOT A PREVAILING PARTY.

The Civil Rights Attorney's Fees Awards Act provides that in actions under section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988(b). Not every favorable ruling during the course of litigation, however, confers prevailing party status. Instead, "[t]he touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship between the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989) (emphasis supplied). *Accord Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 & n.6 (2001).[6]

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[6] *Buckhannon* was decided under the provisions of the Fair Housing Act Amendments of 1988 and the Americans with Disabilities Act that permit a prevailing party to recover attorney's fees. *See*.532 U.S. at 601. Nevertheless, this Court has held that all of the various statutes that permit prevailing parties to recover attorney's fees in terms that track section

The preliminary injunction issued in this case was insufficient to confer prevailing party status on respondents. It was not an adjudication of the merits of this lawsuit; indeed, when the district court ultimately reached the merits, it ruled against respondents, not least because the court had "a hard time understanding . . . that there's some First Amendment right to nude expression in state parks." J.A. 103. On the merits, respondents were losers, not winners. The preliminary injunction was accordingly not the type of "material" alteration in the legal relationship that Congress intended to confer prevailing party status on a civil rights plaintiff.

A. A Plaintiff Does Not Prevail By Obtaining Only Interlocutory Relief.

In common parlance, the term "prevailing" refers to the eventual outcome of a contest or dispute, not to a preliminary or tentative victory. No one thinks that Germany or Japan "prevailed" in World War II because they won the early battles.[7] The same is true of parties that win only the preliminary skirmishes in litigation—unless they ultimately succeed in obtaining a favorable judgment, they have not prevailed. As this Court wrote in *Buckhannon*, quoting the leading legal dictionary, "Black's Law Dictionary . . . defines 'prevailing party' as '[a] party in whose favor judgment is rendered, regardless of the amount of damages awarded . . . . Also termed *successful* party." 532 U.S. at 603 (emphasis in original) (quoting Black's Law Dictionary 1145 (7th ed. 1999)). Thus, as the Court explained in *Hewitt v. Helms*, 482

1988 should be construed consistently. *See id.* at 603 n.4 (citing *Hensley v. Eckerhart*, 462 U.S. 424, 433 n.7 (1983)).

[7] Justice Ginsburg used a similar example in *Buckhannon* when she observed: "Western democracies, for instance, 'prevailed' in the Cold War even though the Soviet Union never formally surrendered." 532 U.S. at 633 (dissenting opinion). This was the case even though Western democracies experienced any number of setbacks during the course of the Cold War.

U.S. 755 (1987), "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760. *Accord, e.g.*, *Buckhannon*, 532 U.S. at 603; *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *Texas State Teachers Association*, 489 U.S. at 792-93; *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam).[8] Accordingly, in law as in common parlance, the term "prevailing" refers to ultimate success, and not a preliminary or interlocutory victory. Indeed, this Court has construed the phrase "prevailing party" within the meaning of section 1988 to exclude preliminary victories that provide no assurance of a lasting benefit that will endure until the time the litigation ends.

In *Hanrahan v. Hampton*, for example, the district court had directed verdicts for the defendants in a civil rights action, but the court of appeals reversed and remanded for a new trial, and also awarded attorney's fees under section 1988 for the successful appeal. *See* 446 U.S. at 754-55. This Court, however, vacated the fee award, holding that fees can be awarded "only to a party who has established his entitlement to some relief on the merits of his claims . . . ." *Id.* at 757. The Court added that favorable "procedural or evidentiary rulings . . . may affect the disposition on the merits, but were themselves not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party under § 1988." *Id.* at 758. To similar effect is *Sullivan v. Hudson*, 490 U.S. 877 (1989), in which the Court held that a litigant is not a "prevailing party" even when she obtains a

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[8] The court of appeals, citing its decision in *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987), thought that prevailing party status turned on whether the plaintiff "obtain[ed] the primary relief sought in the case." Pet. App. 2a. The district court used the same test. *See id.* at 45a. In *Texas State Teachers Association*, however, this Court specifically rejected a test asking whether the plaintiff succeeded on the "central issue" in the litigation. *See* 489 U.S. at 790-91.

ruling that sets aside an administrative denial of her application for disability benefits because "where a court's remand to the agency for further proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party' status . . . until after the result of the administrative proceeding is known." *Id.* at 886.[9]

Equally instructive is *Hewitt v. Helms*. In that case, the court of appeals held that a prisoner hearing committee's reliance on an uncorroborated report from an undisclosed informant to convict a prisoner of striking a correctional officer was unconstitutional, but the defendants later obtained summary judgment on grounds of qualified immunity. *See* 482 U.S. at 757-59. The court of appeals nevertheless held that the prisoner was entitled to recover attorney's fees because he had prevailed by obtaining a holding that his constitutional rights had been violated. *See id.* at 759. This Court reversed, holding that that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760 (citing *Hanrahan*, 446 U.S. at 757). The Court "conclude[d] that a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'

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[9] *Sullivan v. Hudson* was decided under the attorney's-fee provision of the Equal Access to Justice Act ("EAJA"), which authorizes an award of attorney's fees and other expenses against the United States "to a prevailing party . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A), *quoted in* 490 U.S. at 883-84. As we explain above, all statutes utilizing the prevailing party standard for awarding fees should be construed consistently. *See* note 6, *supra*. Indeed, in *Hudson* the Court cited decisions construing section 1988 to support its construction of the EAJA. *See* 490 U.S. at 886-87 (noting that "[t]he situation [in *Hudson*] is for all intents and purposes identical to that. . . in *Hanrahan*").

Any other result strains both the statutory language and common sense." *Id.* at 763.

Finally, in *Texas State Teachers Association*, the Court rejected a test for prevailing party status that turned on whether the plaintiff had succeeded on a significant or central issue in the case. The Court reasoned that this approach would permit a plaintiff to obtain an interlocutory fee award following what seemed to be a significant interlocutory victory even though its significance might have eroded by the end of the case. "Congress," this Court held, "cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees . . . ." 489 U.S. at 791.[10]

Thus, "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Farrar*, 509 U.S. at 109 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). To be sure, no great quantum of relief on the merits is required for prevailing party status. In *Farrar*, for example, the Court held that an award of nominal damages made the plaintiffs prevailing parties because it created a legal obligation to pay a judgment that did not

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[10] It was in this context that the Court added: "A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendent lite* or at the conclusion of the litigation." 489 U.S. at 791. In context, it is plain that the Court's statement about relief *pendent lite* is not referring to preliminary injunctive relief, but rather to an interlocutory ruling that provides some of the ultimate relief sought on the merits. Indeed, in *Texas State Teachers Association*, the plaintiffs obtained a judgment invalidating a school district's policies forbidding teachers to discuss employee organizations during the school day or to use internal mail and other facilities to discuss employee organizations. *See id.* at 786-87. It was because the judgment provided the plaintiffs with a permanent alteration in school policies that this Court ruled that the plaintiffs were prevailing parties. *See id.* at 793.

previously exist. *See id.* at 113-14.[11] Similarly, a judicially enforceable consent decree, even unaccompanied by an admission of liability, "create[s] the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Association*, 489 U.S. at 792-93). Still, both an award of nominal damages and a consent decree provide some measure of relief to the plaintiff that lasts until the end of the litigation. There is no authority, in contrast, to support the view that a "prevailing party" includes "a litigant who left the courthouse emptyhanded." *Id.* at 614 (Scalia, J., concurring).

B. The Preliminary Injunction Was Not Relief On The Merits Of Respondents' Claim.

Although prevailing party status requires that a plaintiff achieve a victory on the merits, the district court never reached the merits when ruling on respondents' motion for a preliminary injunction. Instead, the district court's evaluation of the merits was preliminary—it considered only whether there was "a substantial likelihood of success on the merits," Pet. App. 14a, as well as the equitable considerations involving the balance of hardships and the public interest that govern issuance of preliminary injunctive relief. *Id.* Nevertheless, the court of appeals concluded that "the preliminary injunction in this case decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants—and thus was on the merits." *Id.* at 2a-3a. That holding, however, is inconsistent with the district court's contemporaneous statement that it had considered only

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[11] In *Farrar*, the Court added that it will generally be inappropriate to award attorney's fees in a case in which the plaintiff recovers only nominal damages because no fees are ordinarily the only "reasonable" award in a case in which the plaintiff fails to convince the trier of fact that he experienced any compensable damages. *See* 506 U.S. at 114-16.

respondents' likelihood of success on the merits when it granted the preliminary injunction. It is likewise inconsistent with this Court's precedents.

In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), Camenisch, a deaf student, obtained a preliminary injunction requiring the University to pay for a sign-language interpreter to assist him with his studies in an action under the Rehabilitation Act of 1973. *See id.* at 392-93. After Camenisch graduated, the University contended that the propriety of the injunction had become moot. This Court stated that if the injunction had decided the merits of Camenisch's claim, the injunction's propriety would not be moot because the parties still disputed who should bear the cost of the interpreter. *See id.* at 393-94. The Court nevertheless held that the held that although the "likelihood of success on the merits was one of the factors" that the lower courts had considered when Camenisch obtained preliminary injunctive relief, that did not mean that the injunction was "tantamount to decisions on the underlying merits . . . ." *Id.* at 394. The Court explained:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Id. at 395 (citations omitted).

Accordingly, a decision to grant a preliminary injunction "may not be considered a 'final judicial decision based on the actual merits of the controversy.'" *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716 (1981) (per curiam)

(quoting *Camenisch*, 451 U.S. at 396).[12] Indeed, in *Bellanca*, the Court added that when it reviews a preliminary injunction in a First Amendment case, its review is limited "to whether the District Court abused its discretion in concluding that plaintiffs were likely to prevail on the merits of their claims, *not whether the ordinance actually violated the First Amendment.*" *Id.* (emphasis added).[13]

It follows that the preliminary injunction issued in this case is not properly characterized as a judgment on the merits of respondents' First Amendment claims. It was issued one day after suit was filed; on short notice; petitioners had little opportunity to prepare a defense, no opportunity to engage in discovery, and had not even seen the exhibits introduced at the hearing; petitioners' counsel and witness were not able to attend the hearing except by telephone; and the preliminary injunction did no more than preserve the status quo by requiring petitioners to offer the accommodations that they had volunteered to Wyner in the past. That decision, accordingly, has none of the hallmarks of a judgment on the merits. Indeed, the district court itself observed, even as it granted preliminary relief: "It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide issues on

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[12] In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court added that it is of no consequence whether the district court frames its ruling granting a preliminary injunction as based on the merits or based on the equitable factors governing preliminary relief, since "any conclusions reached at the preliminary injunction stage are subject to revision . . . ." *Id.* at 317.

[13] In *Bellanca*, the Court discussed *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), in which the Court described its review of a preliminary injunction as limited to whether "the District Court abused its discretion by granting preliminary relief" under the First Amendment. *Id.* at 933. The *Doran* Court added: "This is the extent of our appellate inquiry, and we therefore 'intimate no view as to the ultimate merits of [respondents'] contentions.'" *Id.* (quoting *Brown v. Choate*, 411 U.S. 452, 457 (1973) (brackets in original)).

this quick a basis, but I do feel like this meets the test of the injunction." J.A. 95. Thus, the district court's ruling was based on its consideration of whether respondents "were *likely* to prevail on the merits of their claim, not whether the [challenged policies] actually violated the First Amendment." *Bellanca*, 451 U.S. at 716 (emphasis in original).[14] The district court's assessment of the merits was preliminary and predictive; there was no actual ruling on the merits at the time that the preliminary injunction issued.

Congress surely could not have intended that prevailing party status turn on a hurried and tentative ruling on inade-

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[14] Although it has long been settled that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)), there is some disagreement in the circuits on the precise role that merits play in evaluating a request for preliminary injunctive relief. *See* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 507-30 (2003). Ten circuits use a balancing approach in which a weaker showing on the merits can support a preliminary injunction if accompanied by a strong showing on the equities. *See Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998); *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998); *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821, 824 (7th Cir. 1998); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir.), *cert. denied*, 522 U.S. 810 (1997); *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996); *Walmer v. United States Dept. of Defense*, 52 F.3d 851, 854 (10th Cir. 1995); *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994); *Standard Havens Products., Inc. v. Gencor Industries., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990), *cert. denied*, 506 U.S. 817 (1992); *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). The remaining circuits seem to treat a finding of a likelihood of success on the merits as a necessary requirement for a preliminary injunction. *See Walgreen Co. v. Hood*, 275 F.3d 475, 477-78 (5th Cir. 2001); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001); *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993).

quate notice and an incomplete record as in this case. To be sure, the legislative history of section 1988 indicates that Congress envisioned awards of attorney's fees for some types of interlocutory victories. *See* S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912; H.R. Rep. No. 94-1558 at 7-8 (1976). In *Hanrahan v. Hampton*, however, the Court surveyed this legislative history, and concluded: "[I]t seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims . . . ." 446 U.S. at 757.

Indeed, nothing in the legislative history supplies the slightest support for the view that a preliminary injunction could make a civil rights plaintiff a "prevailing party." The legislative history plainly indicates that an adjudication of liability or a judicially enforceable consent decree can confer prevailing party status. *See Buckhannon*, 532 U.S. at 607 & n.9. Some Members of the Court have concluded that the legislative history goes so far as to suggest that a defendant's voluntary decision to discontinue a challenged practice in the absence of formal judicial relief might be sufficient to confer prevailing party status. *See id.* at 637 (Ginsburg, J., dissenting). A majority of the Court, however, thought the legislative history insufficiently clear to overcome the settled rule that the term "prevailing party" requires relief on the merits. *See id.* at 607. But whatever the correct understanding of the legislative intent on this point, there is no support in the legislative history for the view that plaintiffs who ultimately have a final judgment entered against them can nevertheless qualify as prevailing parties. To the contrary, as we explain above, it is settled that "liability on the merits and responsibility for fees go hand in hand; *where a defendant has not been prevailed against, either because of legal immunity or on the merits*, § 1988 does not authorize a fee award against that defendant." *Farrar*, 509 U.S. 109 (quoting *Kentucky v. Graham*, 473 U.S. at 165) (emphasis added).

Accordingly, respondents were not prevailing parties in this litigation. Respondents enjoyed a temporary victory that expired by its terms on February 14, 2003, and then ultimately lost the case on the merits. Respondents were losers, not winners; final judgment was entered against them. Moreover, under the doctrine if res judicata, the district court's final judgment bars respondents or their privies from relitigating any issues that were or could have been raised in this case. *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). Thus, the judgment in this case not only upholds the regulations and park policies that respondents challenged, but it forecloses future challenges. "That is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760 (citing *Hanrahan*, 446 U.S. at 758-59).

To be sure, for a three-hour period on February 14, 2003, the preliminary injunction changed the legal relationship between the parties. But this temporary and ephemeral alteration in the legal relationship between the parties did not confer prevailing party status. Even though the preliminary injunction was based in part on the district court's assessment of respondents' probability of success on the merits, that assessment was the kind of transitory victory that will not suffice to confer prevailing party status because it does not amount to relief on the merits, as we explain above. Indeed, a transitory alteration in the legal relationship between the parties based on a preliminary assessment of the merits that proves to be inaccurate could not possibly be sufficient to confer prevailing party status; if it were, even a plaintiff who obtained a preliminary injunction later reversed on appeal would be a "prevailing party." This Court, however, has already rejected this construction of "prevailing party," holding that when an injunction is set aside on appeal, a fee award for obtaining it must be set aside as well. *See Bray*

v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993).[15]

In fact, the district court recognized which side prevailed on the merits in this litigation, and it was not respondents. Even as it awarded attorney's fees to respondents for obtaining the preliminary injunction, it simultaneously ruled that petitioners were entitled to costs because "final judgment was entered in [their] favor . . . ." Opp. App. 10a. A litigant is entitled to recover its costs, however, only when it is "the prevailing party." Fed. R. Civ. P. 54(d). *See, e.g., Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988) (per curiam). Thus, the district court correctly understood that an interlocutory victory cannot make a litigant a "prevailing party" in a case that she ultimately loses on the merits. The bizarre result here, however, is that although section 1988 provides for "a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988(b), an attorney's fee was awarded to respondents even though costs were awarded to petitioners. Such an approach is inconsistent with the text of section 1988, which indicates that just as liability and fees go hand-in-hand, the award of fees and costs should go hand-in-hand.[16]

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[15] Every circuit to consider the question has rejected a claim that a plaintiff can be a prevailing party by obtaining the benefits of an injunctive decree prior to the time that it is set aside on appeal from the judgment issuing the injunction. *See, e.g., Palmer v. City of Chicago*, 806 F.2d 1316, 1321-22 (7th Cir. 1986); *Doe v. Busbee*, 684 F.2d 1375, 1381-83 (11th Cir. 1982).

[16] One could perhaps reconcile the district court's costs and fee rulings by taking the view that prevailing party status should be determined by reference to each phase of the litigation, permitting a plaintiff to be treated as a prevailing party for purposes of the preliminary injunction hearing even though the defendant proved to be the prevailing party on the merits. As we explain above, however, this Court has rejected such a construction of section 1988, requiring instead that a plaintiff prevail on the merits. The district court's costs award, in turn, demonstrates that even that court understood that petitioners had prevailed on the merits of this litigation.

Had respondents wished to seek a judgment on the merits prior to the planned February 14 protest, despite the limited time available, they could have done so. A court may order trial on the merits to be consolidated with the hearing on a motion for a preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2). The merits of respondents' asserted First Amendment right to engage in the February 14 nude protest would have been an appropriate candidate for consolidation, given the press of time and respondents' theory that they had a right under the First Amendment to engage in the nude February 14 exhibition on a public beach. Respondents, however, sought only preliminary relief in their February 12 motion instead of requesting a judgment on the merits under Rule 65. Nor did the district court enter a consolidation order in accordance with the requirement that the parties "receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Camenisch*, 451 U.S. at 395 (brackets in original) (quoting *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). *Accord* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure (Civil)* § 2950 (rev. 2006).

Respondents' decision not to seek relief on the merits in their February 12 motion is understandable; presumably they did not wish to satisfy the more stringent standard for relief on the merits requiring a plaintiff to establish "actual success on the merits instead of a likelihood of success." Pet. App. 34a (quoting *Siegel v. Lepore*, 234 F.3d 1163, 1213 (11th Cir. 2000)). *Accord, e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). Nevertheless, there is surely no unfairness in holding respondents to their tactical decision to reserve the merits of their First Amendment claim for the summary judgment stage of this litigation. If respondents wanted to obtain attorney's fees based on their request

for emergency relief permitting the February 14 event, they were required to prevail on the merits, as we explain above. Respondents, however, made no effort to obtain a ruling on the merits at the February 13 injunction hearing.

Moreover, had respondents asked the district court to consider the merits of their asserted First Amendment right at the February 13 injunction hearing, the parties would have been on fair notice that attorney's fee liability was at stake. Under those circumstances, respondents' victory could well have made them prevailing parties within the meaning of section 1988.[17] Respondents, however, did not choose that course. Under these circumstances, respondents' preliminary success in a case that they ultimately lost does not make them "prevailing parties" entitled to an award of attorney's fees.

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[17] There is some question about whether an injunction issued on the merits but under circumstances in which there is no meaningful opportunity for appellate review because it concerns a short-lived event and will become moot once the event concludes is a sufficient basis on which to confer prevailing party status. *See Kay v. David Douglas School District No. 40*, 484 U.S. 1032, 1032-34 (1988) (White, J., dissenting from denial of certiorari); *Alioto v. Williams*, 450 U.S. 1012, 1012-13 (1981) (Rehnquist, J., dissenting from denial of certiorari). Nevertheless, every circuit to reach the question has concluded that the fact that injunctive relief becomes moot before it can be reviewed on appeal does not itself defeat prevailing party status. *See, e.g., Murphy v. Fort Worth Independent School District*, 334 F.3d 470, 471 (5th Cir. 2003) (per curiam); *Richard S. v. Department of Developmental Services of California*, 317 F.3d 1080, 1088-89 (9th Cir. 2003); *Young v. City of Chicago*, 202 F.3d 1000, 1000-01 (7th Cir. 2000) (per curiam); *National Black Police Association v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997); *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508, 1514-15 (10th Cir. 1990); *Bishop v. Committee on Professional Ethics of the Iowa State Bar Association*, 686 F.2d 1278, 1290-91 (8th Cir. 1982). This Court need not decide that question in this case, however, since the injunctive relief issued here was not a victory on the merits and therefore does not confer prevailing party status, as we explain above.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT IS NOT PROPERLY CONSTRUED TO AWARD ATTORNEY'S FEES TO PLAINTIFFS WHO LOSE ON THE MERITS.

To the extent that section 1988 is ambiguous, this Court has construed the statute to advance its underlying objective of providing incentives to counsel to bring meritorious civil rights actions. *See, e.g., Kay v. Ehrler*, 499 U.S. 432, 436-38 (1991); *City of Riverside v. Rivera*, 477 U.S. 561, 577-78 (1986) (plurality opinion). *See also, e.g.*, S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5909-10; H.R. Rep. No. 94-1558, at 1 (1976). "Persons who bring meritorious civil rights claims, in this light, serve as 'private attorneys general.'" *Buckhannon*, 532 U.S. at 635-36 (Ginsburg, J., dissenting) (quoting S. Rep. No. 94-1011, at 5 (1976)). Thus, section 1988 should be construed in light of "[t]he statutory policy of furthering the successful prosecution of meritorious claims . . . ." *Kay*, 499 U.S. at 438.

It follows that section 1988 should not be construed to authorize attorney's fee awards that have the effect of encouraging plaintiffs and their counsel to file non-meritorious actions. In *City of Burlington v. Dague*, 505 U.S. 557 (1992), for example, the Court held that fee awards should not be enhanced when a plaintiff prevails on a particularly risky claim because the result of such an approach "would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." *Id.* at 563. *Accord Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 724-27 (1987) (plurality opinion).[18]

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[18] In *Dague*, the Court elaborated:

> Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is

The statutory objective would be similarly undermined by a rule that permitted plaintiffs who bring non-meritorious claims to recover attorney's fees because they were able to convince a judge to issue preliminary relief in a case that ultimately proves to be meritless. Under such a rule, the potential for an attorney's fee recovery would afford counsel an incentive to sue based not solely on the relative legal merit of a claim, but also in light of the probability that counsel could obtain preliminary relief under the more liberal standard governing interlocutory injunctions. Moreover, if a preliminary injunction issues, the potential liability for attorney's fees would become potent leverage to induce settlement beyond the relative merit of the plaintiff's claim. Section 1988 should not be construed to create such skewed outcomes.

This case illustrates the point. Respondents' suit was utterly without merit. The constitutionality of a generally applicable ban on public nudity that promotes the legitimate government interest in protecting unwilling audiences from exposure to nudity is well settled, at least when applied without reference to the content of any nudist's speech or expression. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-72

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four times more likely to be paid. But with a contingency enhancement, this preference will disappear; the enhancement for a 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provisions.

505 U.S. at 563.

(1991) (plurality opinion); *id.* at 573-79 (Scalia, J., concurring in the judgment); *id.* at 590-91 (White, J., dissenting).[19]

To be sure, perhaps use of a cloth screen might be a less restrictive alternative to a complete ban on nude performances, but this Court has explained that "when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the regulation because some alternative is marginally less intrusive on a speaker's First Amendment interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 217-18 (1997). Instead, a challenged policy should be upheld "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985) (ellipsis in original)).

This test is easily satisfied here; the problem with a cloth screen is that park resources must be diverted to police its use—a problem that was apparent given Wyner's unwillingness on at least two prior occasions to utilize a screen despite having agreed to do so. The fact that park management had previously permitted Wyner to perform in the nude behind a screen did not constitutionally preclude park officials from ending that forbearance, especially in light of its demonstrated inefficacy. In *Rock Against Racism*, for example, municipal officials had previously permitted rock concerts in Central Park without regulating the music's amplification, but that posed no obstacle to enforcement of a new

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[19] Although the issue is infrequently litigated, presumably because the pertinent First Amendment principles are so clear, the lower courts have consistently upheld generally applicable anti-nudity laws against First Amendment attack when applied to persons who appear in public where they may be seen by unwilling viewers. *See, e.g., Egolf v. Witmer*, 421 F. Supp. 2d 858, 871-73 (E.D. Pa. 2006); *Craft v. Hodel*, 683 F. Supp. 289, 292-99 (D. Mass. 1988); *Eckl v. Davis*, 124 Cal. Rptr. 685, 693-95 (Cal. Ct. App. 1975).

regulation promulgated in light of past complaints about the volume of music. *See* 491 U.S. at 784-88, 800-03. *Cf. Thomas v. Chicago Park District*, 534 U.S. 316, 323-25 (2002) (ordinance permitting park district to waive permit requirements was not invalid because officials had discretion to forebear enforcement).

Respondents' challenge to the park's time, place, and manner regulation was no better. The authority of parks to enforce regulations governing the time, place, and manner of expressive activities on a content-neutral basis is well settled. *See, e.g., Thomas*, 534 U.S. at 323-25; *Rock Against Racism*, 491 U.S. at 794-96; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95 (1984). Although respondents argued at the injunction hearing that the regulation granted unfettered discretion to the park's management and effectively permitted content-based regulation of speech, J.A. 78-83, the district court declined to credit this allegation when granting the preliminary injunction. *See* Pet App. 16a-17a.

Even worse, the allegation proved to be without substance. In a facial challenge to a regulation under the First Amendment, a court must consider evidence of the manner in which a challenged regulation has been interpreted and administered to determine if it confers effectively unfettered discretion or facilitates content or viewpoint discrimination. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Rock Against Racism*, 491 U.S. at 795-97. Yet, at both the preliminary injunction and summary judgment stages of this litigation, there was no evidence that the challenged regulation had been interpreted or administered to confer unfettered discretion on park management, or that it had been utilized in a fashion that facilitated content or viewpoint discrimination. To the contrary, the evidence showed only that petitioners had previously agreed to forebear enforcement of a perfectly valid anti-nudity regu-

lation based upon Wyner's agreement to utilize a screen—an agreement that she twice failed to honor.

Respondents' First Amendment claim, in short, was adjudged to be without merit. Indeed, respondents never appealed from the district court's judgment against them on the merits; the question whether respondents' First Amendment rights were violated by the challenged regulations is no longer an open one in this litigation. Under the holding below, however, respondents' counsel will receive almost $ 26,000.

Amici fully accept the obligation of state and local governments and officials to pay attorney's fees when they violate a plaintiff's civil rights. Yet under the holding below, petitioners must divert scarce public resources to pay attorney's fees to a party whose civil rights were never infringed. *Amici* represent thousands of local governments and officials charged with safeguarding the taxpayers' funds, and utilizing those scarce resources to fund a variety of important public services. We can see no justification for diverting these scarce tax dollars to the payment of attorney's fees of plaintiffs who lose on the merits. The idea that Congress could have intended to create attorney's fee liability for cases in which there has been no violation of the plaintiff's civil right is, in a word, bizarre.

Requiring section 1983 defendants who have committed no legal wrong to pay attorney's fees is not the only anomaly engendered by the holding below. It will also create unnecessary litigation at the preliminary injunction stage. Because state and local governments are institutional litigants that often appear before the same judges, they frequently attempt to work out temporary accommodations at the preliminary injunction stage in order to spare the district courts the burden of deciding difficult legal questions in an expedited fashion. And because state and local governments are entrusted with husbanding tax dollars, they also try to avoid incurring large

expenses in order to mount expedited defenses of applications for preliminary injunctive relief. If the holding below stands, however, state and local governments and their officials will have no choice but to mount full scale defenses of motions for preliminary injunctive relief in order to avoid subsequent liability for attorney's fees even when, as here, they prevail on the merits of the litigation. Conversely, under the holding below, if a plaintiff obtains preliminary relief, that fact alone will put enormous pressure on state and local governments to settled otherwise meritless litigation because the preliminary victory will itself be sufficient to establish liability for attorney's fees.

The incentive of counsel to act as private attorneys general on behalf of civil rights is fully protected by the availability of attorney's fees to those who prevail on the merits. Neither the text nor the purpose of section 1988, however, supports a rule that would award fees on meritless claims because a district court, in the infancy of litigation and under the liberal standard for preliminary relief, mistakenly assesses the plaintiff's likelihood of success on the merits. Congress cannot have intended to require the taxpayers to subsidize such litigation. The holding below is utterly at odds with the salutary purposes of section 1988.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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